

Volume 15

Pages 2855 - 3065

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

IN RE GOOGLE PLAY STORE
ANTITRUST LITIGATION,

)
)
) NO. 21-md-02981-JD
)

THIS DOCUMENT RELATES TO:

EPIC GAMES, INC.,

Plaintiff,

VS.

)
) NO. 3:20-cv-05671-JD
)
)

GOOGLE, LLC., et al.,

Defendants.

San Francisco, California

Thursday, November 30, 2023

TRANSCRIPT OF PROCEEDINGS

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I N D E X

Thursday, November 30, 2023 - Volume 15

DEFENDANT'S WITNESSESPAGE VOL.GENNAI, PAUL NICHOLAS

| | | |
|------------------------------------|------|----|
| (SWORN) | 2859 | 15 |
| Direct Examination by Mr. Kravis | 2859 | 15 |
| Cross-Examination by Ms. Moskowitz | 2880 | 15 |
| Redirect Examination by Mr. Kravis | 2953 | 15 |

WEISSINGER, MATTHEW REED

| | | |
|------------------------------------|------|----|
| (SWORN) | 2964 | 15 |
| Direct Examination by Ms. Bell | 2964 | 15 |
| Cross-Examination by Ms. Moskowitz | 2995 | 15 |
| Redirect Examination by Ms. Bell | 3000 | 15 |

GRANT, ANDREW JAMES

| | | |
|--------------------------------|------|----|
| (SWORN) | 3001 | 15 |
| Direct Examination by Mr. Mach | 3002 | 15 |
| Cross-Examination by Mr. Byars | 3034 | 15 |

STOLFUS, HANS

| | | |
|---------------------|------|----|
| By Video Deposition | 3041 | 15 |
|---------------------|------|----|

E X H I B I T STRIAL EXHIBITSIDEN EVID VOL.

| | | |
|------|------|----|
| 588 | 2947 | 15 |
| 591 | 2873 | 15 |
| 596 | 2916 | 15 |
| 606 | 2939 | 15 |
| 812 | 3041 | 15 |
| 813 | 3041 | 15 |
| 814 | 3041 | 15 |
| 815 | 3041 | 15 |
| 2903 | 2897 | 15 |

I N D E XE X H I B I T S

| <u>TRIAL EXHIBITS</u> | <u>IDEN</u> | <u>EVID</u> | <u>VOL.</u> |
|-----------------------|-------------|-------------|-------------|
| 5528, pages 1 and 12 | | 2991 | 15 |
| 6618 | | 3031 | 15 |
| 6619 | | 3032 | 15 |
| 6621 | | 3030 | 15 |
| 7260 | | 2984 | 15 |
| 8567 | | 2903 | 15 |
| 8636 | | 2910 | 15 |
| 10004 | | 3006 | 15 |
| 10005 | | 3019 | 15 |
| 10010 | | 3003 | 15 |
| 10028 | | 3041 | 15 |
| 10171 | | 3041 | 15 |
| 10184 | | 3041 | 15 |
| 10193 | | 3041 | 15 |
| 10194 | | 3041 | 15 |
| 10196 | | 3041 | 15 |
| 10198 | | 3041 | 15 |
| 10521 | | 2967 | 15 |
| 10538 | | 3024 | 15 |
| 10540 | | 3025 | 15 |

GENNAI - DIRECT / KRAVIS

Thursday - November 30, 2023

9:28 a.m.

P R O C E E D I N G S

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(Proceedings were heard in the presence of the jury:)

THE COURT: Okay.

THE CLERK: Please stand and raise your right hand.

PAUL NICHOLAS GENNAI,

called as a witness for the Defendant, having been duly sworn,
testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

Please state your full name for the Court and spell your
last name.

THE WITNESS: My name is Paul Nicholas Gennai. Gennai
is spelled G-E-N-N-A-I.

THE CLERK: Thank you.

MR. KRAVIS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. KRAVIS:

Q. Good morning, Mr. Gennai.

A. Good morning.

Q. What do you do for a living?

A. I work at Google.

Q. What is your current title at Google?

A. I'm a vice president of product management.

GENNAI - DIRECT / KRAVIS

1 Q. How long have you worked at Google?

2 A. In January it will have been 16 years.

3 Q. And what were you doing before you came to Google?

4 A. So I grew up and studied in Melbourne, Australia; and
5 after university, I worked at a consulting company and then at
6 a telecommerce company in Australia.

7 Q. And why did you leave Australia to come to the
8 United States to work for Google?

9 A. Yeah, one of my degrees at university was computer
10 science. When I was studying there, I was really blown away
11 with what Google was able to do with technology, and I had an
12 interest then. When I worked at Telstra, the telecommerce
13 company, that was when Google announced the Android project,
14 and I thought that was fascinating and I submitted my résumé
15 soon after.

16 Q. What was the first position that you held when you joined
17 Google?

18 A. I initially joined on a team called business operations
19 and strategy.

20 Q. And did there come a time around 2010 when you moved to a
21 different position?

22 A. Yes. In 2010, I changed both job function. I became a
23 product manager at Google and I also joined the Android team.

24 Q. And in that position as a product manager on the Android
25 team, who did you report to?

GENNAI - DIRECT / KRAVIS

1 A. I reported to Jamie Rosenberg.

2 Q. And did your responsibilities include work on strategy for
3 Android?

4 A. It did, yes.

5 Q. And did your responsibilities also include work on
6 Google's Android app store?

7 A. It did, yes.

8 Q. Now, did there come a time more recently when you left the
9 Android team?

10 A. Yes. Sometime in mid-2020.

11 Q. Now, during the time that you worked on the Android team,
12 did Google invest in projects to improve the Google Android app
13 store?

14 A. Yeah. That was largely what we were doing at the time.

15 Q. And I'd like to ask you now about a few of those
16 improvements that occurred during your time on the team.

17 First, did there come a time a few years after you started
18 working on the team when Android Market was rebranded as the
19 Google Play Store?

20 A. Yeah, that's right. I think that was around 2012.

21 Q. And were you involved in the decision to rebrand
22 Android Market as the Play Store?

23 A. I was, yes.

24 Q. Why did Google do that? Why did Google rebrand
25 Android Market as Play?

GENNAI - DIRECT / KRAVIS

1 **A.** Yeah, at the time, as we looked at users or buyers of
2 smartphones and how they were making their decisions, one of
3 the things that was unique about the iPhone that the Android
4 phones didn't stack up well against was the digital content
5 experience. So listening to music, watching movies, reading
6 books.

7 And a lot of that I think comes from the fact that, you
8 know, the iPhone was born of the iPod.

9 And Google had a lot of those services. We had a music
10 product. We had a movies product. We had a books product.
11 But they were all branded different things; they were hard to
12 find. So the effort with Google Play was to bring those
13 together and bring them together with the app store.

14 **Q.** And was the decision to rebrand Android Market as the
15 Play Store affected by competition between Android phones and
16 iPhones?

17 **A.** Yeah, exactly.

18 **Q.** Let me ask you about another one.

19 Have you heard of something called the Play Developer
20 Console?

21 **A.** I have, yes.

22 **Q.** What is the Play Developer Console?

23 **A.** The Play Developer Console is the site that developers go
24 to submit their applications to be distributed on Google Play.

25 **Q.** Now, when you were on the Android team, did Google make

GENNAI - DIRECT / KRAVIS

1 some improvements to the Developer Console?

2 **A.** Yes, substantially so. Once Android Market was rebranded
3 to Google Play, we staffed a large team around that effort.

4 **Q.** And can you briefly describe for us the improvements that
5 were made to the Play Developer Console during that time?

6 **A.** Yeah. So the way to think about the Developer Console,
7 when we -- when it initially launched, it was Android Market
8 and it was a very basic website that a developer could come to,
9 they submitted their application, they gave their application a
10 name. That was really all it did.

11 As we built it into the full-blown Developer Console, it
12 really became a place for developers to manage their
13 applications. So they could manage their store listing, see
14 how it was performing, but also get feedback about where their
15 app was working and not to help them optimize it. So it became
16 more encompassing.

17 **Q.** And why did Google choose to invest in improving the Play
18 Developer Console in the way that you've described?

19 **A.** Yeah, I think about that from two perspectives. From the
20 Google Play perspective, you know, our business model is
21 aligned with the business model of developers; and so if they
22 succeed, we succeed. And so we have, you know, great incentive
23 to make sure that developers are succeeding.

24 From the Android platform perspective, we want to make
25 sure that users are seeing that apps are high quality, and so

1 we're trying to boost the quality of applications as they're
2 choosing what phone they're going to buy.

3 **Q.** Before we move onto the Developer -- from the Developer
4 Console, I just want to ask you about one more piece.

5 When a developer puts their app in the Play Store, is the
6 developer required to make their app available in every country
7 where the Play Store's available?

8 **A.** No. They get to select on a country-by-country basis.

9 **Q.** And can a developer use the Developer Console to make that
10 country-by-country selection of where their apps will appear?

11 **A.** Yes, that's exactly where they do it.

12 **Q.** And from a user's perspective, how does the experience of
13 the Play Store differ from one country to another?

14 **A.** You know, in the most obvious way, language; but if we put
15 that aside, we've made optimizations for the layout of the
16 store. Different -- different regions have different
17 expectations about how applications look. So the store can
18 look different.

19 The way we've invested in the payments network. So local
20 forms of payments available in some countries and not in other
21 countries.

22 But then also we -- when we review applications, we review
23 that they abide by local laws. So even if developers are
24 saying "I want my app globally," the experience that the user
25 is going to see is some applications won't be there; the

1 catalog will be different.

2 **Q.** All right. I'd like to ask you some questions now about
3 some improvements that occurred in both the Google Play Store
4 and the Apple App Store during your time on the Android team.
5 And I think we've prepared a little demonstrative to keep track
6 of these -- to keep track of these.

7 If we could go to Slide 2, please. Great.

8 So let me ask you first about apps for children. During
9 the time that you were on the Android team, did there come a
10 time when Apple launched a section in the Apple App Store that
11 featured curated apps for children?

12 **A.** They did, yes.

13 **Q.** And did the Google Play Store respond shortly thereafter
14 by launching its own changes to the store to curate apps for
15 children?

16 **MS. MOSKOWITZ:** Objection. There's a lot of leading
17 happening.

18 **THE COURT:** Well, let's just get through it.

19 Go ahead.

20 **THE WITNESS:** We did. That was actually a project
21 that I managed.

22 **BY MR. KRAVIS:**

23 **Q.** What was your involvement in that project?

24 **A.** I was the product manager overseeing it.

25 **Q.** Are you familiar with how these kids' categories look in

1 the two respective stores?

2 **A.** I am. They're designed largely for the parent that is
3 using the device. So, you know, laying out applications by the
4 child's age or particular types of content that the parent
5 might be interested in.

6 **Q.** And could we have the next slide, please?

7 Are these the two sections of the respective stores that
8 you were just describing?

9 **A.** They are, yes.

10 **Q.** Let me ask you about another one. Are you familiar with
11 something called promo codes?

12 **A.** I am, yes.

13 **Q.** What are promo codes?

14 **A.** Promo codes are little codes that a developer can get,
15 actually from the Play Developer Console, that they can give
16 out to their users or their fans that the user can then redeem
17 for an item in the application or for the application itself.

18 **Q.** And during the time you were on the Android team, did the
19 Play Store make any improvements in this area?

20 **A.** Yes, we built the promo code system.

21 **Q.** And did the Apple App Store do anything shortly
22 thereafter?

23 **A.** Yes. They followed us and launched the same.

24 **Q.** Let me ask you about app preregistration. Are you
25 familiar with something called app preregistration?

1 A. I am, yes.

2 Q. What is that?

3 A. Preregistration allows a developer to set up the page on
4 the app store even before they've launched the application. So
5 they can -- they can direct a user to their page, and the user
6 can say "I want to preregister for this application"; and when
7 it launches, it will be automatically installed onto their
8 device.

9 Q. And during the time you were on the Android team, did the
10 Play Store improve its offerings in this area?

11 A. Yes, we built a preregistration.

12 Q. And shortly thereafter, did the Apple App Store offer a
13 similar feature?

14 A. They followed us, yes.

15 Q. Could we see the next slide, please?

16 What are we looking at here?

17 A. This is the preregistration flow on both, on Google Play
18 and the Apple App Store.

19 Q. One more to ask you about here. Subscription game
20 catalogs.

21 During the time you were on the Android team, did the
22 Apple App Store launch something called Apple Arcade?

23 A. They did, yes.

24 Q. And what is Apple Arcade?

25 A. Apple Arcade is a subscription offered through Apple's app

1 store that allows a user to subscribe to a catalog of games.

2 Q. And was there a similar feature that was later added to
3 the Play Store?

4 A. Yes. We built something called Google Play Pass.

5 Q. And what is Play Pass?

6 A. It's similar. A user can subscribe and get premium
7 versions of applications or versions of applications with
8 features unlocked via Google Play.

9 Q. And if we could look at the next screen.

10 What are we looking at here?

11 A. These are the sign-up screens for Google Play Pass and
12 Apple Arcade.

13 Q. Okay. You can take that down. Thank you.

14 Now, Mr. Gennai, these various improvements that we've
15 been talking about with respect to the Google Play Store -- the
16 kid categories, the promo codes, preregistration, Play Pass --
17 why did the Google Play Store develop these things?

18 A. I think in most instances -- I mean, we were -- we were
19 looking at Apple. It was apparent that Apple was looking at
20 us. We were also very regularly speaking with developers. We
21 were surveying developers, and we were trying to understand
22 what developers were most looking for, and we were trying to
23 stay competitive relative to Apple's app store.

24 Q. And were these improvements that we've been talking about
25 intended for the benefit of any particular category of

1 developers especially?

2 **A.** So in some of the instances of these launches, but not all
3 of them, but some of them, we were really building out
4 functionality that larger developers that had larger teams and
5 more time and more money could build. These things were best
6 practice of how to build and grow an application. And so by
7 Google Play building it, we could offer that to the developer
8 community at large and sort of raise all boats.

9 **Q.** I'd like to change topics now and ask you about something
10 a little bit different.

11 During the time that you were on the Android team, did
12 there come a time when Google lowered the service fee that it
13 charged for subscriptions?

14 **A.** It did. Yes, we did.

15 **Q.** I'd like to ask you some questions about that and start by
16 asking, do you recall which app store lowered its subscription
17 fees during this time first? The Apple App Store or the Google
18 Play Store?

19 **A.** In terms of the publicly known right, the Apple App Store.

20 **Q.** Now, the jury has heard evidence that about 15 months or
21 so passed between the time when the Apple App Store lowered its
22 fee in this area and the time when the Google Play Store
23 lowered its fee.

24 So let me ask you, why did it take Google 15 months to
25 lower its service fees in this area?

1 **A.** Yeah, the developers of the applications, sort of largest
2 subscription application on Google Play, in the vast majority
3 of instances, those developers were already paying either
4 0 percent or 15 percent.

5 **Q.** Let me take those one at a time, and let me start with
6 15 percent.

7 Why is it that during this time period some of the largest
8 subscription developers were paying a 15 percent service fee?

9 **A.** So we had two programs operating at the time. One called
10 LRAP for living room applications and another called ADAP for
11 audio applications, for music applications. And those were
12 instances where developers were working with us and in a
13 partnership, and they were offered a 15 percent revenue share
14 as part of that.

15 **Q.** And why did the lower service fee offered by the LRAP and
16 ADAP programs affect the timing of Google's subscription
17 service fee reduction that we're talking about now?

18 **A.** Because disproportionately the developers that would be
19 affected by it that were already offering subscription services
20 on Google Play at the time were already at a rate that was
21 actually better than the rate that Apple had publicly
22 announced.

23 **Q.** Now, I think you also said a moment ago that some of the
24 developers offering subscriptions were actually paying
25 0 percent. Did I hear that right?

GENNAI - DIRECT / KRAVIS

1 **A.** That's correct.

2 **Q.** And why was that during this time?

3 **A.** There was a component of our billing policy that at the
4 time, I think to put it lightly, was confusing and could be
5 misinterpreted. And so there was -- there were developers that
6 were selling digital goods and digital goods subscriptions on
7 Google Play at the time that were not using Google Play
8 Billing.

9 **Q.** And why did that issue over the application of the digital
10 goods exception affect the timing of this particular service
11 fee reduction by the Google Play Store?

12 **A.** Yeah, because we knew that we would have to come around
13 and correct that problem; and if we were going to be making
14 changes to billing policy, we'd rather do them at the same time
15 as opposed to making two changes that the developer ecosystem
16 would have to deal with.

17 **Q.** Okay. So with that timing in mind, why did the Google
18 Play Store eventually lower its service fee on subscriptions to
19 match the reduction by the Apple App Store?

20 **A.** For the reason I was talking about earlier. We were in
21 competition with them. We felt we needed to respond.

22 **Q.** I want to change topics now and ask you about the document
23 that you have -- you should have in the folder in front of you.
24 It's marked as Exhibit 591.

25 Mr. Gennai, do you recognize Exhibit 591?

GENNAI - DIRECT / KRAVIS

1 **A.** I do yes.

2 **Q.** What is it?

3 **MS. MOSKOWITZ:** Objection.

4 **THE COURT:** 591?

5 Oh, okay. Well, let's see if he recognizes it.

6 **BY MR. KRAVIS:**

7 **Q.** Do you recognize it?

8 **A.** I do, yes.

9 **Q.** What is it?

10 **A.** So I have a habit of --

11 **THE COURT:** Just say is it an e-mail? Is it a memo?
12 Just at that level of description, what is it?

13 **THE WITNESS:** It's --

14 **THE COURT:** A page from a report? Just very
15 generally, what is it?

16 **THE WITNESS:** Yeah, I sometimes write things I have in
17 my head down for myself.

18 **THE COURT:** These are your personal notes?

19 **THE WITNESS:** That's correct.

20 **THE COURT:** Okay. What's the objection?

21 **MS. MOSKOWITZ:** That I intend to use it, but it's
22 hearsay if they do. They can cover it on redirect.

23 **MR. KRAVIS:** I'm not offering it for the truth. I'm
24 just asking him a few questions about his own words in the
25 document.

GENNAI - DIRECT / KRAVIS

1 **THE COURT:** You're going to use it, Ms. Moskowitz?

2 **MS. MOSKOWITZ:** I am.

3 **THE COURT:** Okay. As a technical matter, nothing in
4 this document, which I'm going to admit, is anything you can
5 rely on as a fact. Okay? However, that will magically change
6 when Ms. Moskowitz asks a question. That's just the way the
7 rules of evidence work.

8 So for right now, nothing in this is either true or
9 untrue. It basically goes to the witness' state of mind, what
10 he may have been thinking, and then let's see what happens on
11 cross.

12 Okay. So it's provisionally admitted on those grounds.

13 (Trial Exhibit 591 received in evidence.)

14 **MR. KRAVIS:** Thank you, Your Honor.

15 **BY MR. KRAVIS:**

16 **Q.** Now, Mr. Gennai, I think I heard you say a moment ago that
17 this document reflects some of your own notes. Did I hear that
18 correctly?

19 **A.** That's correct.

20 **Q.** And why was it your practice to create documents with your
21 own notes like this?

22 **A.** It just cleared -- it was a way to clear my own thinking.

23 **Q.** And what is the subject matter or the issue that this
24 particular page of notes is discussing?

25 **A.** Yeah. It's described at the top in those two bullet

1 points. So, you know, one point being that there was an
2 increasing amount of competition in the app store space on
3 Android in particular; and the second relates to this sort of
4 app store tax meme that larger developers, particularly large
5 gaming developers, were out in the -- out in the world talking
6 about how -- or complaining about how they felt that the
7 Google Play 30 percent fee was too high.

8 **Q.** All right. There's just one piece of this document that I
9 want to ask you about in particular.

10 Do you see where it says -- about three quarters of the
11 way down the page there are three bullet points: "Firstly,"
12 "Secondly," "Finally"? Do you see that?

13 **A.** I do, yes.

14 **Q.** I'd like to direct your attention to the first of those
15 bullet points, the one that reads "Firstly." Are you with me
16 there?

17 **A.** I am, yes.

18 **Q.** All right. So the first sentence reads (as read):

19 "Firstly, competing on price (rev share) is prone to
20 be a race to the bottom and is not necessary across the
21 board (only to the most strategic partners where loss of
22 the titles would disproportionately affect the business)."

23 Do you see that?

24 **A.** I do, yes.

25 **Q.** What did you mean by that?

GENNAI - DIRECT / KRAVIS

1 **A.** So we did -- you know, we were in conversations with
2 developers, particularly larger developers, who were coming to
3 us and trying to negotiate the 30 percent revenue share rate
4 down.

5 From our perspective, it was very important that we were
6 thinking about that in a way that was fair to the ecosystem.

7 **THE COURT:** Okay. We're just talking about your
8 mental impressions. Okay? So what did you mean by this? When
9 you were writing this down, why were you writing this to
10 yourself?

11 **THE WITNESS:** I'm writing --

12 **THE COURT:** It's not about Google or policies. Just
13 your mental thoughts. All right? That's the question.

14 **THE WITNESS:** I'm not sure I actually follow.

15 **MR. KRAVIS:** Let me ask --

16 **THE COURT:** Just tell us what you were thinking when
17 you wrote that down. That's it. Not about policies or
18 anything else. What were you -- sorry, Mr.?

19 **THE WITNESS:** Gennai.

20 **THE COURT:** What were you thinking when you wrote
21 this? That's it.

22 **THE WITNESS:** I was thinking that if we negotiated
23 with a developer to reduce the rev share rate, that if that
24 were to become known, that other developers would come to us to
25 do the same and may feel they're in a different situation and

1 try to negotiate it further down, and that that was a series of
2 steps that would play out badly for us.

3 **BY MR. KRAVIS:**

4 **Q.** So when you use the --

5 **THE COURT:** Questions limited to his mental
6 impressions, please.

7 **BY MR. KRAVIS:**

8 **Q.** When you use -- yes, Your Honor.

9 When you use the phrase "prone to be a race to the bottom
10 here," just focusing on your own mental impressions on those
11 words, what did you understand those words "race to the bottom
12 here" to be referring to? You, yourself.

13 **A.** That one developer after the next, if we weren't careful,
14 we could keep feeling that we had the need to step down.

15 **Q.** Okay. You can set that aside.

16 Last topic, Mr. Gennai.

17 The jury's heard some about switching during the trial and
18 switching studies. I want to ask you about your own
19 experience.

20 Do you personally switch between an iPhone and an
21 Android phone on a regular basis?

22 **A.** Yes, I do.

23 **Q.** And about how often do you do that?

24 **A.** I realize this isn't normal, but three to four times a
25 year.

1 Q. And how long have you been switching between phones three
2 to four times a year for?

3 A. Since about 2012.

4 Q. And why did you do that? Why did you switch between an
5 iPhone and Android phones three to four times a year since
6 2012?

7 MS. MOSKOWITZ: Objection. Relevance.

8 THE COURT: Sustained.

9 BY MR. KRAVIS:

10 Q. How does the ease of the switching process today compare
11 with the way it was when you first started doing this?

12 A. Fortunately, it's substantially easier.

13 Q. And today does Apple, in fact, make an app that allows you
14 to switch from an Android phone to an iPhone?

15 A. They do, yes.

16 Q. What is that app called?

17 A. It is called Move to iOS.

18 Q. Is Move to iOS available in the Google Play Store?

19 A. It is, yes.

20 Q. And have you used the Move to iOS app yourself?

21 A. I have, yes.

22 Q. And have you prepared a short video to show what that
23 looks like?

24 A. That's correct.

25 MR. KRAVIS: At this time, Your Honor, I'd ask to

GENNAI - DIRECT / KRAVIS

1 publish Exhibit 6712, which I understand is without objection.

2 **MS. MOSKOWITZ:** That's right, Your Honor. I thought
3 it was a demonstrative, though.

4 **MR. KRAVIS:** Yes, just to publish. I didn't offer it.

5 **THE COURT:** So you're going to see this only this
6 time. It won't be back in the jury room. Okay?

7 Go ahead.

8 **BY MR. KRAVIS:**

9 **Q.** And just before we start the video here, Mr. Gennai, what
10 is it that we're looking at on the screen?

11 **A.** On the left-hand side is an Android device that I think
12 will show how certain aspects of it are configured. On the
13 right-hand side is an iPhone that's sort of fresh out of the
14 box ready to be set up.

15 **MR. KRAVIS:** Okay. Could we start the video please?

16 (Video was played but not reported.)

17 **MR. KRAVIS:** And if we could just pause there for a
18 moment, please.

19 **BY MR. KRAVIS:**

20 **Q.** First of all, Mr. Gennai, is that your hand in the video
21 there?

22 **A.** I believe it is, yes.

23 **Q.** And what do we see there?

24 **A.** So just showing very quickly that there's some personal
25 information on this device. So there's some photos. I just

GENNAI - DIRECT / KRAVIS

1 showed some photos in the gallery. That there's my contacts,
2 and also that there's three apps that have been installed that
3 weren't previously on the device --

4 **Q.** Okay.

5 **A.** -- Instagram, Snapchat, WeChat.

6 **MR. KRAVIS:** And then can we resume the video to see
7 how that works?

8 (Video was played but not reported.)

9 **MR. KRAVIS:** Can we pause it there please?

10 **BY MR. KRAVIS:**

11 **Q.** What did we just see in the video?

12 **A.** So we saw the installation of the Move to iOS app. I
13 think one of the things worth highlighting is the Google Play
14 Store showing that it has over 100 million installs. It's a
15 very popular application.

16 Installing it, going through some of the flows to set it
17 up, choosing what I wanted to transfer from the Android phone
18 to the iPhone. So I think I selected contacts, photos, and
19 apps. There's a pairing procedure where you put the phones
20 beside each other and key in a code, and then the transfer
21 completed.

22 **Q.** When you, yourself, did the process, how long did it take
23 you about start to finish?

24 **A.** A couple minutes.

25 **Q.** Now, finally, Mr. Gennai, we talked about your work on the

GENNAI - CROSS / MOSKOWITZ

1 Android team and your work on the Play Store specifically.

2 We can take that down. Thank you.

3 During that time, how did you view the competition between
4 the Google Play Store and the Apple App Store?

5 **A.** I don't think there was a day in those 10 years I did not
6 wake up thinking about what Apple was doing.

7 **Q.** Thank you, Mr. Gennai.

8 **MR. KRAVIS:** I pass the witness.

9 **THE COURT:** Okay. Go ahead.

10 **MS. MOSKOWITZ:** Thank you, Your Honor.

11 **CROSS-EXAMINATION**

12 **BY MS. MOSKOWITZ:**

13 **Q.** Good morning, Mr. Gennai.

14 **A.** Good morning.

15 **Q.** You talked about your role reporting for -- to Jamie
16 Rosenberg. You did that for about 10 years, from 2010 to 2020;
17 is that right?

18 **A.** That's right.

19 **Q.** And Mr. Rosenberg was a senior leader with oversight over
20 Android during that -- most of that period?

21 **A.** He was a leader in the Android. He didn't have oversight
22 over Android but, yes.

23 **Q.** Let's talk about your role, though.

24 Your role and your team's role was kind of like an outside
25 management consultant's team; right?

1 A. That and a few other things.

2 Q. Well, your team was not actually responsible for anything
3 in the business; right?

4 A. For analytics, I was responsible for it. I ran an
5 analytics team. The consulting team, yes, I would agree with
6 what you're saying.

7 Q. But analytics, by that you refer to like data crunching
8 and providing that data to folks who need it?

9 A. That's correct.

10 Q. Okay. So if you include that in the business, can we just
11 put that aside for a second?

12 You and your team were not responsible for any of the
13 actual business decisions and business work that was going on
14 within Android in Google Play; correct?

15 A. There were instances where I was more responsible, but
16 broadly the team was a consulting team.

17 Q. Right. You were brought in to help the business do
18 projects?

19 A. In most instances, yes.

20 Q. And in many instances you were basically in a support
21 role?

22 A. An advisory role, yes.

23 Q. And one of those advisory roles was project management,
24 like organizing meetings, setting up cadence of check-ins,
25 things like that?

1 A. It was less often that actually.

2 Q. Okay. So you're saying now that it was actually more
3 strategic than project management?

4 A. It was helping problem solve. I don't -- I wouldn't think
5 of it as operational in the way of setting up meetings.

6 Q. Okay. Well, I don't think we need to focus on that too
7 much.

8 You talked about the global -- some global aspects of
9 Google Play on your direct. Do you recall that?

10 A. Yes.

11 Q. And that developers can go on this thing called the
12 Developer Console and pick and choose where they're going to
13 be?

14 A. Yes.

15 Q. Google Play is all over the world except China; right?

16 A. I think there's some other exclusions, but largely all
17 over the world.

18 Q. Okay. It's a global store; right?

19 A. Yes. I was responding to everywhere but China, I don't
20 think that's quite right, but it's a global store, yes.

21 Q. Other than China, what percentage of the world is
22 Google Play in?

23 A. I wouldn't know. It's in a large percentage.

24 Q. It's an extremely high percentage; right?

25 A. Outside of China.

1 Q. Okay. And from the comfort of their living room, a
2 developer can click where they want their apps to be all over
3 the globe except China and whatever these other places are?

4 A. Yes, in the Developer Console.

5 Q. Right. So developers have access to the world to
6 distribute their apps through Google Play?

7 A. Yes. Where their app can be run, yes.

8 Q. You talked a bit about market conditions and competition
9 quite a bit during your direct; right?

10 A. I think so.

11 Q. You have no idea how many apps are in Google Play's
12 catalog; correct?

13 A. No, not off the top of my head.

14 Q. Right. You couldn't even say if it was significantly
15 larger than other Android app stores, for example?

16 A. Not with confidence.

17 Q. Right. And you can't tell us how it compares to the Apple
18 app catalog; right?

19 A. Not with confidence.

20 Q. You don't even know how many orders of magnitude Google
21 Play Store is for the quantity of apps compared to the Amazon
22 Appstore, for example?

23 A. Not with confidence.

24 Q. And you also don't know whether during the entire time you
25 worked for Android and Google Play whether Google Play was

1 preinstalled on most Android phones; right?

2 **A.** Sorry. Can you -- can you restate that question?

3 **Q.** You have no idea whether while you were on the Android
4 team that Google Play was preinstalled on most Android phones;
5 correct?

6 **A.** Outside of China?

7 **Q.** Sure.

8 **A.** It was installed on a large number -- a large proportion
9 of Android phones.

10 **Q.** You don't know that; right?

11 **A.** I don't...

12 **MS. MOSKOWITZ:** Your Honor, page 83, please, of Tab A.

13 **THE COURT:** Line?

14 **MS. MOSKOWITZ:** Lines 13 to 17. Sorry, Your Honor.

15 **THE WITNESS:** Sorry. What was the page again?

16 **MS. MOSKOWITZ:** We'll show it to you in a moment.

17 **THE WITNESS:** Okay.

18 (Pause in proceedings.)

19 **THE COURT:** That's fine.

20 **MS. MOSKOWITZ:** Let's put that on the screen.

21 **BY MS. MOSKOWITZ:**

22 **Q.** You gave a deposition in this case, sir?

23 **A.** I did, yes.

24 **Q.** And you told the truth?

25 **A.** I did.

1 Q. You were sworn to tell the truth?

2 A. I was.

3 Q. You were asked the following question and gave the
4 following answer (as read):

5 "QUESTION: And during this time, was Google Play
6 preinstalled on most Android phones?

7 "ANSWER: I don't know."

8 Did I read that right?

9 A. You did, yes.

10 Q. You don't know whether today Google Play is preinstalled
11 on most Android phones; correct?

12 A. That question was not -- did not specify --

13 Q. Sir, I'm not asking about that question. We're moving on.

14 A. Okay.

15 Q. Today you do not know whether Google Play is preinstalled
16 on most Android phones, do you?

17 A. I would ask if we're including China.

18 Q. You have -- do you know one way or the other?

19 A. Not if you're not going to specify the question.

20 MS. MOSKOWITZ: Your Honor, page 83, same page, next
21 couple lines, 18 to 21, please.

22 (Pause in proceedings.)

23 THE COURT: That's fine.

24 BY MS. MOSKOWITZ:

25 Q. You were asked the following question and gave the

1 following answer (as read):

2 **"QUESTION:** Do you know if Google Play is preinstalled on
3 most Android phones today?

4 **"ANSWER:** No. I don't know."

5 Let's talk about the U.S. since you didn't want to talk
6 about China.

7 You do not know whether there are any Android phones in
8 the United States that do not have Google Play Store
9 preinstalled; correct? You don't know that; right?

10 **A.** Sorry. I just want to make sure. I didn't get -- there's
11 a double negative. Can you please restate that?

12 **Q.** You do not know whether there are any Android mobile
13 phones in the United States that do not have the Google Play
14 Store preinstalled?

15 **A.** I think that might be right, yes.

16 **Q.** It's right that you don't know the answer to that?

17 **A.** Again, it depends what we mean by "Android" here, with
18 compatible Android.

19 **Q.** Okay. I'm going to try again.

20 Mobile Android-approved devices, not on incompatible
21 devices, do you know whether there are any such devices in the
22 United States that do not have the Google Play Store
23 preinstalled?

24 **A.** I'm not sure.

25 **Q.** So you can't tell us, for example, how preinstall --

1 preinstallation affects how Google competes with the Samsung
2 store or the Amazon store; right?

3 **A.** How preinstallation affects...

4 **Q.** Well, you don't know how often Google Play's even
5 preinstalled; right?

6 **A.** I mean, I had access to those numbers.

7 **Q.** You don't have them today and you didn't have them then;
8 right?

9 **A.** That wasn't the question I was being asked.

10 **Q.** All right.

11 **THE COURT:** Mr. Gennai, I want you to listen to the
12 question. Argue less, answer more. Okay? If you don't
13 understand it, it's perfectly fine to say "I don't understand,"
14 but let's not debate.

15 **THE WITNESS:** I understand.

16 **THE COURT:** Go ahead.

17 **MS. MOSKOWITZ:** Thank you, Your Honor.

18 **BY MS. MOSKOWITZ:**

19 **Q.** You were asked about, I think, four instances of feature
20 changes on the app store and the Google Play Store on your
21 direct. Do you remember that?

22 **A.** I do, yes.

23 **Q.** And I think your counsel used in his question that some
24 changes were shortly thereafter made. Do you remember that?

25 **A.** Yes.

1 Q. Well, for Apps for Kids, Apple introduced that in
2 December 2013; correct?

3 A. I would have to take your word for it.

4 Q. You don't know? You didn't do that work to come up with
5 those slides that we looked at earlier?

6 A. I don't think the dates were on the slides.

7 THE COURT: You have to get close to the microphone,
8 pull it towards you --

9 THE WITNESS: Sorry. Sure.

10 THE COURT: -- and make it audible.

11 Ask again, please.

12 BY MS. MOSKOWITZ:

13 Q. You didn't do that work to understand what the timing was
14 of the changes that you were comparing and contrasting in the
15 slides you looked at during your direct?

16 A. I knew they were before us, which is what the slide
17 conveyed.

18 Q. Yeah, but the question was shortly; right? And then you
19 said "Yes."

20 A. Broadly to those questions.

21 Q. Okay. Well, so you don't know that Apple introduced it in
22 September 2013?

23 A. Not specifically.

24 Q. And you don't know that Google didn't do it until
25 April 2015? You don't know that either?

1 A. No, that date I remember more because I was associated
2 with it.

3 Q. Okay. You just don't know the delta between Apple
4 introducing it and Google finally doing so?

5 A. Not every feature.

6 Q. You testified a bit about switching. Do you recall that?

7 A. I do, yes.

8 Q. And we saw a video of you doing the move of some of the
9 content from an Android to an iPhone?

10 A. Yes.

11 Q. The phones that were used in the video were not your
12 personal phones that you use every day; right?

13 A. They are not, no.

14 Q. They're like test phones?

15 A. Yes.

16 Q. All right. What was the overall size of the data that was
17 transferred on the phone that you were using, the Google
18 Android phone?

19 A. I couldn't tell you that.

20 Q. Could you tell me how many contacts there were?

21 A. In the order of dozens.

22 Q. Okay. Do you know how many apps there were?

23 A. I think there were three that were installed after.

24 Q. Do you know how many photos there were?

25 A. Dozens.

1 Q. Yeah. There was like 25 megs, actually, we saw on it.
2 Megabytes; right?

3 A. I didn't look at it.

4 Q. All right. Let's pull it up. We have a screenshot.
5 Do you see that there?

6 A. Yes.

7 Q. That's not very much; right?

8 A. It's 25 megabytes.

9 Q. Do you know how many megabytes or gigabytes you have on
10 your personal device for photos?

11 A. More than that.

12 Q. A lot more than that; right?

13 A. For me personally, yes.

14 Q. I looked at mine actually. I have almost 9 gigabytes of
15 photos on my iPhone. Does that sound like a crazy number
16 compared to that, or is that about right for a couple kids and
17 a couple vacations?

18 A. I don't know.

19 Q. Okay. Fair to say that it would take longer to do what
20 you just did if you had a real amount of apps and a somewhat
21 normal amount of photos and contacts and data that you might
22 have accumulated over, let's say, 10 or so years?

23 A. I think photos might be the only thing that takes longer.

24 Q. Okay. But it would take longer than what you showed on
25 the screen; right?

1 A. Sure.

2 Q. You'd also agree that you're fairly familiar with the
3 processes and the steps involved?

4 A. Fairly familiar.

5 Q. I think you said that you do quite a bit of switching, a
6 couple times -- did you say a year?

7 A. Yeah.

8 Q. Okay. You do that for work, though; right?

9 A. Yes.

10 Q. So you're not trying to say that that's an average
11 experience?

12 A. No. I think I even said that --

13 Q. You did.

14 A. Yeah.

15 Q. Do you know that the average is people actually don't even
16 buy a new phone other than one every 2.7 years?

17 A. I would suspect that is in the order of two.

18 Q. Two years?

19 A. Yeah.

20 Q. Okay. That's your just rough guess?

21 A. From when we used to look at it, yeah.

22 Q. Okay. If people are looking at it now and seeing higher,
23 that wouldn't shock you, would it?

24 A. Not necessarily.

25 Q. Right. And, of course not all of those phone buyers are

1 switching operating systems; right?

2 A. Not all of them, no.

3 Q. No.

4 So during this video we watched, you knew what app to look
5 for to do this switch; right?

6 A. Yes.

7 Q. Okay. And let's look at a screenshot.

8 You mentioned there was 100 million downloads, do you
9 remember that, when you went in the app store to go get it?

10 A. Yes.

11 Q. All right. Did you also notice the 3.4 star rating for
12 the app?

13 A. I did not, no.

14 Q. And that there were 180,000 reviews?

15 A. Okay.

16 Q. You didn't pay attention to that during the process?

17 A. No.

18 Q. Okay. So I take it you didn't look at any of those
19 reviews?

20 A. I did not, no.

21 Q. You couldn't tell me how many of those are one-star
22 reviews?

23 A. I could not, no.

24 Q. The Move to iOS app doesn't transfer all of the data from
25 an Android device; right?

1 A. I couldn't tell you either way.

2 Q. Okay. So you don't know whether it can successfully move
3 over music files or e-books or somethings like that?

4 A. Not with confidence that it -- of the specifics, no.

5 Q. I also noticed you didn't select everything to transfer
6 over. You skipped messages, for example.

7 A. I did, yes.

8 Q. Right. And that's messages are something that someone
9 might keep or want to keep as they move over to a new phone;
10 right?

11 A. Sure.

12 Q. Okay. That wasn't shown in the video; right?

13 A. No, it was not.

14 Q. So let's just talk about Apple for a moment.

15 You understand that Google has a number of apps that it
16 makes available on iOS devices; right?

17 A. I am, yes.

18 Q. So in terms of that, you also understand that Google
19 believes that it has a lot of apps -- Gmail, Google Maps --
20 that consumers really want?

21 A. Yes, I'd like to think so.

22 Q. Well, in fact, that's the whole justification for the MADA
23 contract, isn't it?

24 A. No, it is not.

25 Q. Okay. That's not.

1 Okay. So let's just talk about something about those
2 apps.

3 So if Google wanted to compete with iOS so much, one of
4 the things it could have done, or could do today, is pull all
5 of those Google apps -- Gmail, Google Maps, et cetera -- from
6 the app store completely and make them exclusive to Android
7 devices. That's one way they could compete; right?

8 **A.** A bad way to, but hypothetically, yes.

9 **Q.** Well, Apple does that exact thing; right? iMessage and
10 Facetime are only available on iOS devices; right?

11 **A.** And there is counterexamples to that, but those two, yes.

12 **Q.** Okay. Well, let's just talk about the ones I want to talk
13 about.

14 **A.** Sure.

15 **Q.** Let's talk iMessage and Facetime. You agree that those
16 are pretty loved apps by iPhone users; right?

17 **A.** I don't know either way. They're popular apps on the
18 iPhone, yes.

19 **Q.** They're popular apps on the iPhone?

20 **A.** Yes.

21 **Q.** And if you want to use those apps, you cannot buy an
22 Android device and use those apps; right?

23 **A.** That is correct.

24 **Q.** But Google apps are available no matter what. So if I
25 love Gmail, and I do, and if I love Google Maps, and I really

1 do, I can buy an Android or an iPhone?

2 A. That is correct.

3 Q. And you understand also that not just the Google apps are
4 available on iPhone, Google makes money off of those apps on
5 iPhone; right?

6 A. In some instances, yes.

7 Q. Right. And Google also makes money when that little thing
8 called Safari gets clicked and iPhone users do Internet
9 searches; right?

10 A. In some instances, yes.

11 Q. Well, you understand that the Google Search is the default
12 search engine for Safari on Apple iPhones; right?

13 A. Yes, the initial default.

14 Q. So unless someone changes the default, Apple is getting
15 paid billions and billions of dollars by Google for users to
16 search through Google Search on iPhones; right?

17 A. I don't know what that number is.

18 Q. You don't?

19 A. I don't.

20 Q. You're in the office of the CEO now; right?

21 A. I am.

22 Q. So the revenue share between Apple and Google is just not
23 coming up in your job?

24 A. Not in my job.

25 Q. Okay. Let's just continue on with the switching issues

1 that we were talking about.

2 So the video we watched was really just the execution of
3 moving some content from a test phone, a test Google phone, to
4 a test iPhone; right?

5 A. To a new iPhone, yes.

6 Q. A new iPhone, a new test iPhone. You didn't own that,
7 or did you?

8 A. No.

9 Q. Okay. The video didn't tell us anything about why you or
10 any user actually made the decision to buy a new phone in a
11 different ecosystem; right?

12 A. It did not, no.

13 Q. And the video doesn't tell us how often it happens that
14 someone buys a new phone in a completely different ecosystem;
15 right?

16 A. It did not, no.

17 Q. And Google doesn't really have a particularly good
18 understanding of the data on users switching from Android to
19 iOS; correct?

20 A. We have some views of it, some internal and some external,
21 but they -- they're sometimes hazy.

22 Q. You do not have a particularly good understanding of the
23 data on users switching from Android to iOS; correct?

24 A. We can't count it accurately.

25 Q. The data's just not reliable?

GENNAI - CROSS / MOSKOWITZ

1 **A.** I think it's -- in the order of magnitude it's reliable,
2 but I wouldn't attest to it being numerically correct.

3 **Q.** But Google does know that the overall number of operating
4 systems switchers is small; right?

5 **A.** I don't believe that's the case, no.

6 **Q.** Okay. Let's pull up -- well, let's not pull it up yet.
7 Let's look in your binder, please, to Exhibit 2903.

8 **A.** I'm sorry. I'm just going to change binders.

9 **Q.** That's the other binder. Thank you.

10 **A.** Give me the number again. Sorry.

11 **Q.** 2903, please.

12 **A.** (Witness examines document.)

13 **Q.** This is a document titled "Smartphone Purchase Journey
14 2018 U.S. Findings." Do you see that?

15 **A.** I do, yes.

16 **MS. MOSKOWITZ:** Your Honor, I offer 2093 into
17 evidence.

18 **MR. KRAVIS:** No objection.

19 **THE COURT:** It's admitted.

20 (Trial Exhibit 2903 received in evidence.)

21 **MS. MOSKOWITZ:** All right. Let's go to the top of 28,
22 please, and let's pull up that heading, please, and blow it up.

23 **BY MS. MOSKOWITZ:**

24 **Q.** It says the number of OS -- that's operating system? It's
25 on the screen, sir.

1 A. Oh, great. Sorry.

2 Q. It's fine. Do you see where I am?

3 A. I do, yes.

4 Q. OS is operating system?

5 A. Yes.

6 Q. "So while the number of operating system switchers is
7 small," do you see that?

8 A. I do.

9 Q. And then there's more switching behavior between Android
10 OEMs within Android than churn to iOS; correct?

11 A. I'm sorry. I'm not seeing that.

12 Q. That's not there. I'm just asking if you know.

13 A. Do I know?

14 Q. Yeah. Do you know that?

15 A. No.

16 Q. All right. Page 4, please.

17 Do you see where I am there? It says (as read):

18 "There is more switching behavior between Android
19 OEMs than churn to iOS."

20 Do you see that?

21 A. I do.

22 Q. All right. You can take that down.

23 Google's done some work to try to understand user behavior
24 in terms of why people switch; correct?

25 A. Yes, I believe so.

1 Q. It's conducted studies to try to answer that question?

2 A. That's right.

3 Q. And those studies show that users do not typically switch
4 operating systems because of the app store; correct?

5 A. I don't know.

6 Q. Okay. Let's look to 1766, which is in evidence. So we'll
7 put that right on the screen.

8 This is a presentation entitled "Android Consideration
9 Likely Purchasers and Recent Purchasers." Do you see that?

10 A. Yes.

11 Q. Let's just go to page 14 to level set here.

12 The bottom right-hand quadrant shows that only 17 percent
13 of Android users even considered switching operating systems
14 from Android to iOS. Do you see that?

15 MR. KRAVIS: Objection. Lack of foundation.

16 THE COURT: I'm sorry, which page is this?

17 MS. MOSKOWITZ: Page 14, please, Your Honor, of 1766
18 in evidence.

19 THE COURT: It's in evidence?

20 MS. MOSKOWITZ: Correct, Your Honor.

21 THE COURT: Okay. Go ahead. It's overruled.

22 BY MS. MOSKOWITZ:

23 Q. The bottom right here shows 17 percent of Android users
24 even considered switching operating systems from Android to
25 iOS; right?

1 A. I'm just trying to understand it. Give me one moment.

2 Q. "Potential Switchers," do you see the heading on the
3 screen?

4 A. Yes.

5 Q. Right. And it talks about current OS on the left; right?
6 That's a "Do I currently have an Apple iOS or do I currently
7 have an Android"; right?

8 A. Yes.

9 Q. And there's a "Consider," an "Intend To," and an "Actually
10 Switched"; right?

11 A. Yes.

12 Q. So if I'm looking at the "Consider" column, that's telling
13 me how many current Android device owners are even considering
14 switching to iPhone; is that fair?

15 A. Yes, I think that's what this survey is saying.

16 Q. And, in fact, if you go to the right, only 7 percent
17 actually intended to switch from Android to iOS; right?

18 A. I don't know if these two numbers are supposed to get
19 added together or the one is a subset of another. That's the
20 only thing I would say.

21 Q. Okay. So you think that they might be added together?

22 A. Right.

23 Q. You just don't know?

24 A. I don't know.

25 Q. All right. You understand that there's lots of -- you can

1 take that down.

2 You understand there are lots of reasons why people may
3 switch operating systems?

4 A. Yes.

5 Q. Camera, battery life, user interface, things like that?

6 A. Yes.

7 Q. You also understand there are lots of reasons why people
8 do not switch; right?

9 A. Yes.

10 Q. That includes having friends and family already with the
11 same device, or I already have a watch or a tablet or a TV in
12 the ecosystem; right?

13 A. That's right.

14 Q. And, in fact, iMessage, which we talked about earlier as
15 one of the coveted apps, that's another reason why people don't
16 move; right?

17 A. Potentially.

18 Q. All right. And let's go back to 1766 in evidence to
19 page 37.

20 This is presenting top reasons for smartphone purchase.
21 Do you see where I am? And it's on the screen.

22 A. I do.

23 Q. So there's 15 reasons why people are making a smartphone
24 purchase. Do you see that?

25 A. Yes.

1 Q. None of those reasons is the app store; right?

2 A. It's a survey that had options. So the list of options is
3 what's listed here.

4 Q. So you're saying you didn't even put app store as even a
5 reason why people could pick to switch?

6 A. I don't know who did this survey.

7 Q. All right. You testified on -- you can take that down,
8 please.

9 You testified on direct about the change in subscriptions
10 from 30 percent to 15 percent starting in the second year. Do
11 you remember that?

12 A. I did, yes.

13 Q. So let's just walk through that a bit.

14 At some point in the first part of 2016, Google heard
15 rumors that Apple was going to lower that fee that it charged
16 developers for subscriptions down from 30 to 15 for year two
17 and beyond; right?

18 A. I don't know that actually.

19 Q. Oh, you didn't know that you guys knew about that before
20 Apple announced it?

21 A. I don't recall it.

22 Q. Okay. Mr. Rosenberg was involved?

23 A. Yes.

24 Q. And after multiple meetings, the relevant business team,
25 including Mr. Rosenberg, actually decided to do nothing in

1 response to that rumor; isn't that right?

2 **A.** I don't recall either way.

3 **Q.** All right. Why don't I ask you to go to Exhibit 8567 in
4 your binder.

5 This is an e-mail chain from -- well, the top one is from
6 Mike Petrillo to Mr. Rosenberg, you, and others on June 3rd,
7 2016. Do you see that?

8 **A.** Yes.

9 **MS. MOSKOWITZ:** Your Honor, I offer 8567 into
10 evidence.

11 **MR. KRAVIS:** No objection.

12 **THE COURT:** It's admitted.

13 (Trial Exhibit 8567 received in evidence.)

14 **BY MS. MOSKOWITZ:**

15 **Q.** All right. I'm going to look at the bottom e-mail
16 starting from Mr. Rosenberg on May 28. Do you see that?

17 **A.** Yes.

18 **Q.** He talks about the rumors about Apple. Do you see that?

19 **A.** Yes.

20 **Q.** This is before Apple announced the change; right?

21 **A.** It appears to be.

22 **Q.** All right. So Mr. Rosenberg provides an update for the
23 thread -- sorry -- not Mr. Rosenberg, Mr. Petrillo does on the
24 top e-mail. Do you see where I am?

25 **A.** Yes.

1 Q. And he talks about the core group having met a few times?

2 A. Yes.

3 Q. And Mr. Rosenberg and Mr. Samat were involved; right?

4 A. I think they're -- I don't know if Mr. -- they're on the
5 e-mail thread. That's all I can attest to.

6 Q. Okay. Well, I highlighted here. It says (as read):

7 "We've just had an opportunity to talk through it
8 with Sameer and Jamie."

9 Do you see that?

10 A. Sorry. Yes.

11 Q. Sameer is Mr. Samat?

12 A. That's correct.

13 Q. Jamie is Mr. Rosenberg?

14 A. Mr. Rosenberg.

15 Q. And Sameer Samat was the head of all Android and
16 Google Play?

17 A. At that time I don't recall exactly what he was
18 responsible for.

19 Q. Okay. He did at some point become that?

20 A. Yes.

21 Q. Okay. And he reports in here, Mr. Petrillo, on the
22 fourth -- fifth bullet after all the recap of all the
23 discussions, it says (as read):

24 "We'll keep our billing policy as is for now. No
25 need for deal review."

1 Do you see that?

2 A. Yes.

3 Q. All right. So the decision at this time was "Stay put,
4 don't need to do anything"; right?

5 A. We would wait to see what was announced.

6 Q. Okay. You think that all of that was just to wait and
7 see?

8 A. If I read the original e-mail from Jamie --

9 Q. It's okay if that's your answer. Your answer is "We were
10 just going to wait and see"?

11 A. We were considering these sorts of changes all the time.

12 Q. Sir --

13 A. In response to this, we would wait.

14 Q. Sir, okay. It's fine if that's your testimony. I just
15 want to know what it is.

16 Your testimony is that this was -- you were staying put
17 just to see what Apple was actually going to announce? That's
18 your testimony?

19 A. We would regroup after Apple announced.

20 Q. Okay. And for the next 18 months you did not announce --
21 you did not enact a change; right?

22 A. I don't recall the explicit timing.

23 Q. Okay. 15 months during from the direct testimony, 18
24 months from Mr. Rosenberg, something in that zone?

25 A. Sure.

1 Q. Okay. And so I think I heard some testimony from you on
2 direct that there was no rush because a bunch of developers
3 were already paying 0 or 15 percent. Did I get that right?

4 A. I feel that the intensity of solving that problem was
5 lower, yes.

6 Q. Okay. But you understand plenty of developers were paying
7 30 percent; right?

8 A. Yeah, some developers were paying 30 percent.

9 Q. I just want to understand what you're saying was being
10 factored into those 18 months and what wasn't.

11 Are you saying that there was any fretting going on about
12 what to do with Apple during those 18 months?

13 A. Fretting?

14 Q. Yeah. Were you -- well, I heard that word maybe it was
15 yesterday, so I just want to make sure I understand what your
16 view is of what was happening during that time.

17 Was Google wringing its hands or worried about Apple
18 during these 18 months?

19 A. We were definitely conscious that we were uncompetitive in
20 that respect over those -- at that period of time.

21 Q. Okay. But you were comfortable with the fact that
22 still -- there wasn't a rush for the 18 months because it
23 wasn't an emergency; some people were already paying that?

24 A. Yeah. For the two reasons that I was just calling out,
25 yes.

1 Q. Okay. But there were reasons that had nothing to do with
2 Apple during that 18 months?

3 A. It also takes time to implement changes.

4 Q. Okay. So we have time, we have no rush, people were
5 already paying. I think you also mentioned this policy change
6 that you were working on --

7 A. That's correct.

8 Q. -- to close the loophole?

9 A. I'm not sure I used those words, but policy change, yes.

10 Q. Okay. You've heard those words used for what happened?

11 A. I've probably seen them.

12 Q. Okay. So those were all sort of things going on during
13 this time that had nothing to do with Apple; right?

14 A. No, I think they very much did have to do with Apple and
15 our response to them.

16 Q. Okay. So this change to the billing policy, this
17 loophole -- I guess not your word, but others at Google's
18 word -- but you know what I mean; right?

19 A. I think I know what you mean.

20 Q. And what I mean is that there were ambiguities, according
21 to you, or plain language, according to developers, that there
22 were developers out there that didn't need to use Google Play
23 Billing for certain digital content; right?

24 A. There was that belief, yes.

25 Q. Okay. And Google was concerned -- well, withdrawn.

1 Google wanted to do something about this, to start making
2 all developers use Google Play Billing and pay a commission or
3 a fee regardless of what type of digital content or where it
4 could be consumed; right? That was the thing that Google
5 wanted to close and fix?

6 **A.** I'm not sure I can attest to something like that. It was
7 that that particular part I think was misunderstood, and we
8 knew we needed to clarify it.

9 **Q.** Okay. Google wanted to start making sure and enforcing
10 that every single developer that previously fell under this
11 exception was going to start using Google Play Billing and pay
12 a fee?

13 **A.** No, because the exception had a sort of a -- the intended
14 bound, and so the developers that were not within the intended
15 bound, we were trying to make sure were paying the fee, yes.

16 **Q.** Well, so the intended bound, I'm going to assume you're
17 referring to apps that sold digital content that could be
18 consumed outside of the app. Am I getting that about right?

19 **A.** Yeah, probably.

20 **Q.** Okay. But you don't know?

21 **A.** Right, I can't remember the precise language.

22 **Q.** Okay. So I shouldn't ask you questions actually about
23 what Google was intending or meant or what the circumstances
24 were. You don't remember that?

25 **A.** I wouldn't -- I wouldn't say I remember it letter for

1 letter.

2 **Q.** Okay. Well, you know and remember that Google was
3 concerned, because you testified about it on direct, that
4 Google was concerned that absent this change or closing of the
5 loophole, that developers would actually stop using Google Play
6 Billing? They would deintegrate Google Play Billing; right?

7 **A.** The developers that were outside of compliance with our
8 policy already weren't using Google Play Billing.

9 **Q.** Okay. Different point.

10 So Google wanted to make sure that it started closing this
11 loophole so that other developers were saying -- not going to
12 say "These developers don't have to use Google Play Billing. I
13 shouldn't have to, and I'm going to cut it out and not use it";
14 right?

15 **A.** Yes, we wanted to be fair.

16 **Q.** Well, you wanted to make sure that you solved the
17 deintegration risk that was presented by your perception that
18 there was uneven enforcement of what you thought the policy
19 was; right?

20 **A.** Yes. We felt it was uneven and we wanted it to be fair
21 and even.

22 **Q.** But you knew you were going to have some unhappy
23 developers if you closed the loophole; right?

24 **A.** Yes.

25 **Q.** And you needed to land that policy change with developers

1 who were going to be unhappy?

2 **A.** I'm not sure that language was used, but we wanted to
3 speak to developers about it.

4 **Q.** All right. Well, why don't you turn to Exhibit 8636,
5 please.

6 **A.** (Witness examines document.)

7 **Q.** Are you there, sir?

8 **A.** I am.

9 **Q.** All right. This is a March 10, 2017, e-mail that you're
10 copied on. Do you see that?

11 **A.** I do.

12 **MS. MOSKOWITZ:** Your Honor, I offer 8636 into
13 evidence.

14 **MR. KRAVIS:** No objection.

15 **THE COURT:** It is admitted.

16 (Trial Exhibit 8636 received in evidence.)

17 **BY MS. MOSKOWITZ:**

18 **Q.** All right. On page 2, there's an executive summary at the
19 top about subscriptions Version 2, policy and rev share
20 followup. Do you see that?

21 **A.** I do.

22 **Q.** And "Subscriptions V2" is a reference to the change we are
23 discussing going from 30 to 15 percent for subscriptions in
24 year two and thereafter?

25 **A.** I don't know either way.

1 Q. You don't know?

2 A. No.

3 Q. Okay. You know that this was being discussed during the
4 March of 2017 time period, right, between when Apple announced
5 and when Google announced in those 18 months?

6 A. Yes.

7 Q. All right. And you see "Closing the policy loophole,"
8 second bullet under the "Points of Agreement"? Do you see
9 that?

10 A. I do.

11 Q. Does that give you an indication it's about what we've
12 been talking about for the last few minutes?

13 A. It's written here.

14 Q. You have no idea what that refers to?

15 A. No, no, no. I'll agree with you that that phrase was
16 used.

17 Q. Okay. And that phrase is talking about the same thing
18 we've just been talking about for the last I don't know how
19 many minutes?

20 A. I think we can assume that.

21 Q. Okay. So it's saying that you think -- not you -- (as
22 read):

23 "Google thinks it's good but landing will be key."

24 Do you see that?

25 A. Yes.

1 Q. And, in fact, down below (as read):

2 "Key questions for today: Options and landing the
3 policy change."

4 Do you see that?

5 A. I do.

6 Q. All right. So Google did, in fact, use landing the policy
7 change as something it was considering when it was working on
8 this closing the loophole; right?

9 A. Whoever wrote these notes used that language.

10 Q. Okay. So that's the only place that you think it might
11 be?

12 A. I don't know.

13 Q. All right. Land -- but land, we know what "land" means;
14 right? Land a policy change means softening the blow to who
15 might be some unhappy campers; right?

16 A. No, absolutely not.

17 Q. Okay. So you don't -- actually have ever heard the word
18 "land," but you know absolutely that it doesn't mean what I
19 just said?

20 A. Google lands --

21 Q. Sir, I --

22 A. -- launches every day.

23 Q. All right. So your view is just actually sending out the
24 announcement, making it happen, that's what you think?

25 A. Successfully get to the end.

1 Q. Okay. Do you see Spotify there?

2 A. I do.

3 Q. Spotify, you are aware, was an extremely vocal agitator
4 against Google on its revenue share; right?

5 A. I was not particularly involved with things like that.

6 Q. Different question.

7 A. Sure.

8 Q. Do you know that Spotify was an extremely vocal agitator
9 against Google in its revenue share?

10 A. I saw what I saw in the press.

11 Q. Okay. You never heard that internal at Google?

12 A. I wasn't really involved in those sorts of conversations
13 very often.

14 Q. Okay. So while you were in Android and while you were
15 Google Play, you never heard that and Google just in the press?

16 A. I heard it about developers generally. I don't want to
17 speak to a specific developer. I didn't hear it about Spotify
18 internally specifically I don't think.

19 Q. So you had no idea that Google sort of had to work very
20 closely with getting a deal with Spotify to silence their vocal
21 agitation that you read about in the press?

22 A. I knew that there were discussions going on with them. I
23 wasn't involved with them.

24 THE COURT: All right. Let's take our morning break.
25 We'll come back at 10:45.

1 **THE CLERK:** All rise.

2 **THE COURT:** You remain under oath. Do not discuss
3 your testimony with anyone.

4 **THE WITNESS:** I understand.

5 (Recess taken at 10:33 a.m)

6 (Proceedings resumed at 10:49 a.m)

7 (Proceedings were heard in the presence of the jury:)

8 **THE COURT:** Okay. Go ahead.

9 **MS. MOSKOWITZ:** Thank you, Your Honor.

10 **BY MS. MOSKOWITZ:**

11 **Q.** Just a couple more questions on the subscription change.

12 When Google finally made the change, it was effective
13 January 1, 2018; is that right?

14 **A.** I don't recall.

15 **Q.** Okay. But we can agree there was this 15- to 18-month
16 gap, right, between Apple and Google whenever the dates were?

17 **A.** Yes.

18 **Q.** And during that period that Apple App Store was charging
19 this lower fee and Google wasn't, you're not aware of a single
20 developer that pulled out of the Play Store to focus only on
21 iOS based on that differential pricing; right?

22 **A.** Not that -- not that I can recall.

23 **Q.** You can't name anybody; right?

24 **A.** No, not that I can recall.

25 **Q.** And about this loophole, during the decade or so that this

1 loophole was out there and there were people being charged
2 nothing for that whole time on Google, are you aware of any
3 developer that abandoned iOS and the Apple App Store and came
4 over to Google Play exclusively?

5 **A.** Not that I can name.

6 **Q.** Now, you talked a bit, or at length, about competition
7 with Apple on your direct. I just want to make sure because I
8 didn't hear any mention of these things that the jury's heard a
9 bunch about.

10 You're not testifying that competition with Apple was the
11 justification behind Project Hug, Project Banyan, or the
12 RSA 3.0 premier tier; right?

13 **A.** I think competition with Apple can be related to those
14 things, yes.

15 **Q.** It can be related, but do -- is it your testimony that
16 that was the justification for those projects?

17 **A.** I think competition with Apple colored almost everything
18 we did.

19 **Q.** Okay. Let's turn to your binder Exhibit 596, please.

20 **A.** (Witness examines document.)

21 **Q.** Are you with me?

22 **A.** I am, yes.

23 **Q.** And the top e-mail is an e-mail from you on January 12,
24 2019, titled "Play Distribution Project." Do you see that?

25 **A.** I do, yes.

1 **MS. MOSKOWITZ:** Your Honor, I offer Exhibit 596 into
2 evidence.

3 **MR. KRAVIS:** No objection.

4 **THE COURT:** It is admitted.

5 (Trial Exhibit 596 received in evidence.)

6 **BY MS. MOSKOWITZ:**

7 **Q.** All right. The e-mail is between you and a
8 Mr. Krishnamachari; is that close enough?

9 **A.** Yes.

10 **Q.** And the bottom e-mail is from you to Mr. Krishnamachari.
11 Do you see that?

12 **A.** Yes.

13 **Q.** All right. And you mention a project in the second
14 paragraph here. You talk -- you say that there's going to be a
15 project that a Mike is going to talk to him about. Do you see
16 that?

17 **A.** I do, yes.

18 **Q.** And that project is your biggest Play priority for
19 Quarter 1; right?

20 **A.** It would be my team's.

21 **Q.** Your team's. You and your team's biggest priority?

22 **A.** Yes.

23 **Q.** All right. And your description of the essence of this
24 project is in the next paragraph that starts "Essentially";
25 right?

1 A. Yes.

2 Q. And you say (as read):

3 "Jamie and Sameer" --

4 That's Mr. Rosenberg and Mr. Samat we saw earlier; right?

5 A. Yes.

6 Q. (as read):

7 "Jamie and Sameer are asking us to consider what
8 Google Play should do in the face of increasing app store
9 competition on Android."

10 Do you see that?

11 A. I do, yes.

12 Q. And, again, Jamie was your boss at the time?

13 A. Yes.

14 Q. And fair to say that Mr. Samat at this point in time at
15 least was the head of Android and Google Play business?

16 A. Certainly Google Play. I'm not sure about Android.

17 Q. Okay. But certainly Google Play?

18 A. He led the engineering and -- the engineering component of
19 Google Play.

20 Q. Fair to say that these two individuals were pretty senior
21 business people with oversight of business decisions with
22 respect to Android and Google Play?

23 A. Yes, that is fair.

24 Q. Okay. And in your e-mail, you said that (as read):

25 "This increasing app store competition on Android you

1 talked about is coming from both OEMs and other large
2 platforms."

3 Do you see that?

4 **A.** Can you --

5 **Q.** That competition, that increasing app store competition on
6 Android, is coming both from OEMs and other large platforms.

7 Do you see that?

8 **A.** I do, yes.

9 **Q.** All right. So let's break that down.

10 Let's start with OEMs. Next to the OEMs in the second
11 line where it says "From OEMs," there's a parenthetical where
12 it says (as read):

13 "OEMs were looking to increase revenue and to
14 differentiate themselves with exclusive content."

15 Do you see that?

16 **A.** It does not say "exclusive content." It says "content,"
17 yes.

18 **Q.** Differentiating themselves with content was a reference to
19 getting exclusive content, wasn't it?

20 **A.** I don't think so, no.

21 **Q.** Okay. The way to differentiate themselves was to get
22 content that other people didn't have; right?

23 **A.** I think you can -- no, not necessarily. You can have a
24 competitive store by having similar content to other stores and
25 be complete.

1 Q. Okay. So your reading of "differentiate devices with
2 content" has nothing to do with having content that others
3 don't have?

4 A. No, it could include that.

5 Q. Oh.

6 A. I'm just saying it's not completely that.

7 Q. So it includes having exclusive apps on their phones?

8 A. It might.

9 Q. It might, but you don't read it that way?

10 A. I didn't write it, no. I didn't write "exclusive content"
11 there. I meant "content" more broadly of which exclusive
12 content may be a part of it.

13 Q. Okay. So I'm going to move on.

14 So "content" means apps? At least we can agree on that
15 one?

16 A. I mean, it could mean music and books and movies as well.
17 There was differentiation between OEMs on that sort of basis as
18 well, but apps would be a part of it, yes.

19 Q. And the other type of large competition -- sorry -- app
20 store competition on Android was from large platforms, and it
21 says "Epic" here. Do you see that?

22 A. I do, yes.

23 Q. And Epic at the time had a store on PC that it could bring
24 to mobile; right?

25 A. Yeah, I believe so.

1 Q. And, in fact, you understood Epic had ambitions to bring
2 its store to Android; right?

3 A. Yes, I believe we understood that.

4 Q. And Epic had an extremely popular game at the time; fair?

5 A. Yes.

6 Q. And just to be clear, the app store competition we're
7 talking about -- you were talking about here is on Android;
8 right?

9 A. That is correct.

10 Q. Apple is not discussed here; correct?

11 A. Not here, no.

12 Q. And the Apple App Store is not discussed as a competitor
13 to Google Play in this e-mail?

14 A. Not in this e-mail, no.

15 Q. In fact, Apple, we all know, I think we've heard
16 *ad nauseam*, that Apple does not offer an app store on the
17 Android mobile devices; right?

18 A. That is correct.

19 Q. So to respond to increasing app store competition from
20 OEMs and large platforms like Epic, you report in this e-mail
21 that Mr. Rosenberg and Mr. Samat were willing to consider all
22 options. Do you see that?

23 A. I do, yes.

24 Q. And those options could include changes to Google Play's
25 business model paying OEMs and more; right?

1 A. Yes.

2 Q. And, in fact, Google did start paying OEMs revenue share
3 on Google Play revenue after this; right?

4 A. In some instances, I believe that's right.

5 Q. That's the RSA 3.0 premier tier?

6 A. I don't remember the details, but that sounds roughly
7 correct.

8 Q. All right. We'll come back to that.

9 So in Quarter 1 2019, same time that this was a priority
10 for you and your team, you did, in fact, do some thinking to
11 address the problem of increasing app store competition on
12 Android; right?

13 A. Yes.

14 Q. And I guess it's already in evidence, so I think I can
15 show it. Exhibit 591 you were shown by your counsel to ask
16 about your mental impressions. Do you remember that?

17 THE COURT: That's now in evidence for the truth of
18 the contents.

19 Okay. Go ahead.

20 BY MS. MOSKOWITZ:

21 Q. You're with me?

22 A. I am.

23 Q. Okay. And I just want to understand. These weren't just
24 random musings or notes to self that you took, were they?

25 A. They most certainly were.

1 Q. Okay. I'm going to ask you to turn to the last page of
2 591 in your binder, and you're going to see there some
3 information about this document. Do you see it?

4 A. Yes.

5 Q. It says "Author Paul Gennai at Google" -- "Paul Gennai";
6 right?

7 A. Yep.

8 Q. And it says the date that it was created, March 26, 2019;
9 right?

10 A. Yes.

11 Q. The file name "Play Problem Statement"?

12 A. Yes.

13 Q. Do you see "All Custodians"?

14 A. Yes.

15 Q. That's everybody whose files this document was found in.
16 Do you understand that, sir?

17 A. I do.

18 Q. So this document was shared with Mr. Rosenberg, Mr. Wang,
19 Ms. Kochikar, Mr. Samat, and I guess those folks; right?

20 A. Yes.

21 Q. Those are senior business people in the Google Play
22 business?

23 A. They are.

24 Q. So this wasn't kept just on your computer secretly, you
25 just sort of typing around a bunch of notes?

1 A. It still was written for the intent that I wrote it.

2 Q. But it was shared widely with senior leadership?

3 A. At some stage.

4 Q. Sorry?

5 A. At some stage.

6 Q. Okay. So let's talk about it a little bit more.

7 So the first sentence in here, "For a variety of reasons,"
8 do you see it? It's on the screen.

9 A. Yes.

10 Q. It says (as read):

11 "For a variety of reasons, the longstanding growth
12 and potentially fundamental business model of Google Play
13 is under pressure in 2019."

14 Do you see that?

15 A. Yes.

16 Q. And you list a couple bullet points that contain the
17 factors that are putting this pressure on the fundamental
18 business model of Google Play. Do you see that?

19 A. Yes.

20 Q. The first factor that's putting this pressure on
21 Google Play is "The size and margins of the market are making
22 it attractive for new entrants." Do you see?

23 A. I do, yes.

24 Q. "The size and margins" are talking about Google Play and
25 its success; right?

1 A. The app store market in general.

2 Q. Okay. And the "app store market" meaning the market for,
3 you know, stores to get content and apps on Android?

4 A. I think I was talking about the market more broadly, but
5 yes, Android -- here likely Android.

6 Q. Android; right?

7 A. (No audible response.)

8 Q. And so the point is saying Google Play is getting bigger
9 and more profitable in that market?

10 A. I don't believe I said that, no.

11 Q. Well, you understand this bullet is saying that as markets
12 get large, new entrants are attracted to that market; right?

13 A. Yes. I don't think I said that our margins were
14 increasing.

15 Q. Well, you said the size and margins of the market are
16 making it more attractive; right?

17 A. Making it attractive, yes.

18 Q. Okay. So you're saying you can't tell me if profit
19 margins were increasing, just that they were large enough to
20 attract new entrants? Is that the clarification you're giving?

21 A. That's correct.

22 Q. Okay. So the market was big and profitable and people
23 wanted in; fair?

24 A. Fair.

25 Q. And "new entrants" here refers to companies that wanted to

1 come compete against Google Play in that app distribution on
2 Android; right?

3 A. Potentially, yes.

4 Q. And those potential new entrants are listed right here:
5 OEMs and other folks like Epic; right? The same OEMs and large
6 platforms we just looked at in the prior document; right?

7 A. Yeah. I mean, my -- what is in parentheses there isn't
8 exhaustive. They're examples.

9 Q. Okay. They're the same examples that we just looked at in
10 Exhibit 596?

11 A. I don't recall.

12 Q. Okay. Are there other new entrants that you can think of
13 that you were referring to that you didn't list but that you're
14 talking about now in terms of potential new entrants in the
15 Android app distribution market?

16 A. Yeah, carriers, companies like Amazon, things like that.

17 Q. Right. And companies like big developers like not just
18 Epic but Activision Blizzard King and Riot with big platforms;
19 right?

20 A. Sure.

21 Q. And the way that the new entrants might actually try to
22 compete is described in this bullet as well; right?

23 A. Potential options.

24 Q. Okay. So the potential options that are described here
25 for OEMs is that they can compete by drafting on existing

1 distribution. Do you see that?

2 A. I do.

3 Q. And that's a reference to the fact that OEMs already had
4 established stores or app distribution pathways that they could
5 build upon on Android?

6 A. Yes, many had existing stores.

7 Q. And the other way that new entrants could compete was on
8 price; right?

9 A. Yes.

10 Q. And Epic's given as the example for that?

11 A. Yes.

12 Q. And you understood at the time Epic was, in fact, charging
13 less than Google's fee for its app distribution?

14 A. I believe I was, yes.

15 Q. And the second bullet you have another factor putting
16 pressure on the fundamental business model of Google Play, and
17 you mentioned on direct as well this meme about the app store
18 tax; right?

19 A. Yes. Yes.

20 Q. And you go on to say that (as read):

21 "Larger developers who have more standalone
22 capabilities and often differentiated content" -- there's
23 that term again -- "are leveraging this discontent about
24 the fee in a number of ways."

25 Right?

1 A. Yes.

2 Q. And one of the ways they're leveraging their discontent
3 over Google Play's business model was to go it alone. Do you
4 see that?

5 A. Yes.

6 Q. And "go it alone" refers to going to market on Android
7 with their content and their apps outside of the Google Play
8 Store?

9 A. Yes. In some number of ways, yes.

10 Q. And some number of ways includes direct distribution,
11 starting their own app store, et cetera?

12 A. Getting preloaded, yep, various other ways.

13 Q. All of those ways?

14 A. Yes.

15 Q. It's not talking about those developers going to the Apple
16 App Store and forgoing Google Play entirely; correct?

17 A. Not in this instance, no.

18 Q. All right. And to be clear, Apple and competition with
19 Apple is not listed in these bullets anywhere as one of the
20 factors putting Play business model under pressure?

21 A. No. This relates to Android.

22 Q. Sir -- oh, sorry. It relates to Android?

23 A. Yes.

24 Q. See, you agreed with me. I'm sorry.

25 A. We got there.

1 Q. I apologize. That's on me.

2 All right. So I just want to make sure that you -- is it
3 your view that these two bullets were just your internal
4 thinking and shouldn't be sort of considered as, like, the
5 official Google word?

6 A. Yes.

7 Q. All right. Did you ever see the deck that went to the
8 Business Council about Project Hug and Project Banyan?

9 A. Possibly.

10 Q. All right. Let's pull it up. It's in evidence. It's
11 Exhibit 136. Let's just go to the cover page to orient
12 ourselves.

13 April 9, 2019, is the date, which is around the same time
14 as these notes; right? A couple days later?

15 A. Sure, yes.

16 Q. All right. Do you have an understanding that the title is
17 referring to Project Hug and Project Banyan?

18 A. Certainly -- certainly Hug. I think Samsung was a
19 component of Banyan, so I think we could say that.

20 Q. Okay. So let's look at the executive summary on page 3,
21 and let's look at the "Challenges and Opportunities" bullet.

22 The challenge here that Google Play's growth in business
23 model face risk in, one, increasing competition from OEMs and
24 third-party stores and the emerging app store tax meme? Do you
25 see that?

1 A. I do.

2 Q. That looks pretty familiar to the words you used in those
3 notes to self; right?

4 A. It does, yes.

5 Q. In fact, exactly in some instances; right?

6 A. In those -- some of those words, yes.

7 Q. All right. You can take that down.

8 Let's go back to 591, please.

9 You go on below the bullets we just discussed to state
10 that the circumstances that you were describing were very real
11 problems playing out in the market in 2019; right?

12 A. Yes.

13 Q. And you cite Epic Fortnite as one of the ways that those
14 problems were playing out; right?

15 A. I do.

16 Q. And, of course, we all know that's because Epic had used
17 its standalone capabilities and its differentiated content to
18 go alone by bypassing the Google Play Store; right?

19 A. They had done a number of things.

20 Q. By doing a number of things did you say?

21 A. I don't remember the exact timing, but there were various
22 tactics used by Epic, yes.

23 Q. Including like starting the store, working with others to
24 start a store, those type of things?

25 A. Amongst others, yes.

1 Q. Okay. Trying to get preinstalled?

2 A. Trying to get preinstalled and, yes, other things, a
3 variety of tactics.

4 Q. All right. And you cite Samsung's Galaxy Store there as
5 well as another real way that the real problems have been
6 playing out?

7 A. I'm not sure I used the word -- yes, yes. Fair. Yes.

8 Q. Okay. That's right after that; right? Galaxy Store?

9 A. Yeah.

10 Q. Do you see that?

11 A. I do, yep.

12 Q. Okay. And Samsung at the time had been making moves to
13 get differentiated content on its store on an exclusive basis
14 to try to compete against Google Play; right?

15 A. I believe it had.

16 Q. And, in fact, Fortnite was one of them?

17 A. That is correct.

18 Q. And your proposal follows. You proposed to solve these
19 challenges through a combination of tactics that are required
20 in conjunction. Do you see that?

21 A. Yes.

22 Q. "In conjunction" means all together? Not just one,
23 working together as a multiprong strategy; right?

24 A. I think that's what I was thinking.

25 Q. Let's start with the first one.

1 Firstly -- I think this is the one you were asked about
2 for your mental impressions during direct. Do you remember
3 that?

4 **A.** I do.

5 **Q.** So it says here (as read):

6 "Competing on price (rev share) is prone to be a race
7 to the bottom and is not necessary across the board."

8 Right?

9 **A.** Yes.

10 **Q.** And "race to the bottom" means that competition on price
11 will drive prices down?

12 **A.** Us negotiating with developers on price may eventually
13 sort of go to an unhealthy level for us.

14 **Q.** It would go down?

15 **A.** It would go down, yes.

16 **Q.** And "race to the bottom," in fact, means competition could
17 drive those prices all the way down to the bottom, meaning
18 cost?

19 **A.** Yes, or even less healthy than at cost.

20 **Q.** And you write that competing on price is not necessary
21 across the board; right?

22 **A.** I do.

23 **Q.** So your parenthetical there says you only have to target
24 the developers where the loss of titles could actually cause a
25 significant loss to Google Play's revenue; right?

1 A. That is what I wrote there.

2 Q. And the point being that you can focus on just the people,
3 the developers, that are actually going to disproportionately
4 impact Google Play's business if they were to start going to
5 alternative channels on Android?

6 A. I think -- I think the entire time we worked on Play,
7 there were developers that were in -- that were more strategic
8 to us and we worked differently with, so, yes.

9 Q. Well, it says the partners where the loss of titles would
10 disproportionately hurt Google Play's business?

11 A. Yes. We didn't want to lose popular titles from the
12 store.

13 Q. Well, you didn't just want that; right? You didn't want
14 to lose those developers, you didn't want to lose those
15 developers to app stores, you didn't want other developers to
16 see that happen and then go also to those app stores, and so on
17 and so forth; right?

18 A. We didn't -- I think if we look at however we did not want
19 to lose those titles from our app store.

20 Q. Again, it wasn't just the titles, though. You were
21 worried -- have you heard the word "contagion"?

22 A. I have.

23 Q. Okay. And you've seen it in the context of Project Hug,
24 have you not?

25 A. I have.

1 Q. Okay. And, in fact, I don't think I need to pull it up.
2 It's right there in that Business Council deck several times;
3 right?

4 A. That I can't -- maybe.

5 Q. Okay. In any event, you understand that there was a
6 contagion risk that was part of the driver behind Project Hug?

7 A. Yes. We did -- we did not want the loss of titles from
8 Google Play to sort of start a chain reaction of more and more
9 popular titles on Google Play leaving.

10 Q. Leaving to competing app stores?

11 A. To any other mechanism of distribution, but I think it was
12 the loss of them to Play that we were most concerned about.

13 Q. Just to be clear, you were worried about losing them to
14 other competing app distribution mechanisms on Android?

15 A. I mean, they could just withdraw from Android entirely and
16 keep focusing on iOS.

17 Q. See, that's what I want to drill down on. I really want
18 to drill down on that because I just want to understand how you
19 think that a humungous developer like ABK, for example, would
20 just abandon billions, 3 billion Android devices out in the
21 world and just go to iOS. Why would they do that? They
22 wouldn't; right?

23 A. They can use it as a threat. We didn't see it.

24 Q. Okay. You did not see that?

25 A. No.

1 Q. Okay. So the concern, the contagion risk, was that these
2 developers could leave Google Play and go elsewhere on Android,
3 and that other developers might follow suit to alternative app
4 distribution channels on Android; right?

5 A. Yes, but I think -- I just think you're more --

6 Q. Sir, that was a yes? I'll move on. Was it? That was a
7 yes?

8 A. I think you're more focused on the other --

9 Q. Sir, if it's a no, it's a no. If it's a yes, it's a yes.

10 A. It's close enough to a yes.

11 Q. Thank you.

12 You talked about being interested in here and solving for
13 what we've just been discussing in a way that accomplishes two
14 goals simultaneously. Do you see that?

15 A. I do.

16 Q. And you say (as read):

17 "We can avoid competing on price by lowering the
18 effective revenue share while maintaining the prevailing
19 rate."

20 Right?

21 A. I mean, I'm saying what I'm saying here. We can lower the
22 effective rate while maintaining the prevailing rate.

23 Q. Well, that's not actually what you said. You said (as
24 read):

25 "We can actually lower the effective revenue share

1 for Play while maintaining the prevailing rate."

2 A. I'm sorry. I thought that's what I said, yes.

3 Q. Oh, I'm having a little trouble hearing you. I'm sorry.

4 A. Okay. My apologies too.

5 Q. I apologize as well.

6 A. I'll bring the microphone a little closer.

7 Q. So at the same time, the idea was that you could lower the
8 effective revenue share for some of these targeted developers
9 while keeping the public-facing rack rate, prevailing rate, at
10 its published 30 percent; right?

11 A. Yes. We could keep the rate at 30 percent and enter into
12 a much broader relationship with these developers.

13 Q. And you were going to make sure -- I think you testified
14 about this on direct -- that people didn't know about those
15 deals that you had because it would make other developers try
16 to negotiate their rate further down; right?

17 A. Yes. We tried as much as possible to keep sort of a level
18 playing field amongst developers.

19 Q. Well, you weren't keeping a level playing field, though.
20 You were entering into secret deals that you didn't want other
21 people to know about because that was going to result in
22 competition on price; right?

23 A. I don't think of Hug as secret deals, no.

24 Q. Okay. You didn't publish them or announce them?

25 A. I don't think Google announces most commercial

1 relationships it's in with other companies.

2 Q. In fact, your specific proposal was to not do that so you
3 could keep your published rate at 30 percent?

4 A. And those companies continued to pay the published rate.

5 Q. Right. Exactly. They just got millions and millions of
6 dollars on the side?

7 A. No. They worked with us in larger ways, including with
8 our Cloud business and our Ads business and various other
9 mechanisms.

10 Q. To the tune of millions of dollars in cash and prizes?

11 A. I don't -- I don't know the numbers.

12 Q. All right. You talked about this basically being designed
13 to avoid this race for the bottom, right, on Android?

14 A. I'm saying we can avoid it with something like Hug.

15 Q. And the second tactic here that's required to be deployed
16 in conjunction with Project Hug and the other proposal was the
17 defense of Google Play as the preeminent Android app
18 distribution store can be focused around major points of
19 distribution, particularly in aligning Android's largest OEMs.
20 Do you see that?

21 A. Yes.

22 Q. Was this another random thought that you had? "The
23 preeminent Android app distribution store," that's -- those are
24 your words?

25 A. Yeah, I think we were trying to build the best Android

1 store -- Android App Store.

2 Q. I'm just asking you: Are these your words that you just
3 pulled out of your mind or are these Google's words?

4 A. I think they're my words.

5 Q. All right. Let's pull up Exhibit 8523 in evidence.
6 You've seen this document before, sir, have you not?

7 A. I believe so.

8 Q. All right. Let's go to page 4.

9 This is the existential question for Project Banyan (as
10 read):

11 How do we continue to keep Play as the preeminent
12 distribution platform for Android?"

13 Do you see that?

14 A. I do.

15 Q. So those words made its way into a business presentation
16 on Project Banyan; right?

17 A. I don't know the order of these documents being created.

18 Q. Samsung was Google's largest competitor in Android app
19 distribution?

20 A. On the Android platform, I think that's fair to say, yes.

21 Q. So the tactic we're talking about -- and we can pull it
22 back up on 591 -- this is not defending Google Play Store from
23 competition from the Apple App Store; correct? It's not
24 mentioned anywhere here; right?

25 A. Yes, this is specific to the Android ecosystem.

GENNAI - CROSS / MOSKOWITZ

1 Q. So I want to talk about Samsung, and I want to go back in
2 time a bit to 2016.

3 A. Okay.

4 Q. You had the same role in 2016 that you had in March of
5 2019 when you authored this document 591?

6 A. I was reporting to the same person. My sort of role
7 changed between focusing on Google Play more and focusing on
8 Android more. I don't remember exactly when that change
9 happened.

10 Q. Okay. So in whatever that role was, you worked on
11 projects relating to Samsung during that time; right?

12 A. Particularly later, yes.

13 Q. Okay. But in 2016, you did too; right?

14 A. Probably. I just don't remember the specifics.

15 Q. Okay. Turn your binder to Exhibit 606, please.

16 A. (Witness examines document.)

17 Q. You with me?

18 A. Yeah, I've got it.

19 Q. This is a document titled "Next Steps with Samsung" dated
20 May 23rd, 2016, and your name is up there at the top. Do you
21 see it?

22 A. I do, yes.

23 MS. MOSKOWITZ: And, Your Honor, I move to admit
24 Exhibit 606.

25 MR. KRAVIS: No objection to the admission of the

1 exhibit, but at this point I object to the line of questioning
2 as cumulative.

3 **THE COURT:** Overruled, and it is admitted.

4 (Trial Exhibit 606 received in evidence.)

5 **BY MS. MOSKOWITZ:**

6 **Q.** All right. Let's look to -- well, before I go there.

7 The first page suggests that there's going to be a meeting
8 held in Seoul with -- about a deal between Google and Samsung.
9 Do you see that?

10 **A.** Yeah. It has a list of attendees.

11 **Q.** Yep. And let's turn to page 2.

12 There's a question in here about "How direct should we be
13 in terms of our business interests in phasing out third-party
14 apps with install permissions?" Do you see that?

15 **A.** Yes.

16 **Q.** And there's a team recommendation with a bunch of question
17 marks. They didn't figure it out yet; right?

18 **A.** I have no real recollection of this document either way.
19 Yes, "team recommendation" has question marks after it.

20 **Q.** So the team was undecided about how upfront they wanted to
21 be with Samsung about Google's true business interests in
22 getting rid of third-party app stores on Android; right?

23 **A.** I don't know whether the team had talked about it and not
24 reached a recommendation or not talked about it, nor do I know
25 who wrote this question. It's hard for me to know exactly what

1 is going on here.

2 **Q.** Just reading it with me, is it your understanding that the
3 team with the question marks was undecided, no recommendation
4 at that time, about how upfront Google should be with Samsung
5 about Google's business interests in getting rid of third-party
6 app stores on Android?

7 **MR. KRAVIS:** Objection. Lack of foundation.

8 **THE COURT:** Overruled.

9 **THE WITNESS:** It is hard to know if the team was
10 undecided or that nobody had ever seen this question is what
11 I'm saying.

12 **BY MS. MOSKOWITZ:**

13 **Q.** And they were talking about some user arguments that they
14 might want to focus on as part of the story or pitch that they
15 tell Samsung; right?

16 **A.** Where is that? Sorry.

17 **Q.** Right at the same line. It's saying (as read):

18 "How direct should we be about our business interests
19 versus focus solely on user arguments?"

20 Do you see that?

21 **A.** I do, yes.

22 **Q.** And the "user arguments" there is a reference to "Should
23 we be pitching our idea as like let's stop fragmentation among
24 all of the Android devices and it's better for users to only
25 have one Android app store"?

1 A. It could mean anything other than Google Play's business
2 interests here. I don't know how to interpret it.

3 Q. My interpretation doesn't sound right?

4 A. It's a specific interpretation of it.

5 Q. It's one of the potentials?

6 A. Of a potential.

7 Q. All right. Item 3 (as read):

8 "How direct should we be to Samsung in terms of the
9 economic exchange for what we want?"

10 Right?

11 A. Yes.

12 Q. This one has a recommendation. The team recommendation
13 here is (as read):

14 "Wait for Samsung to bring it up. But if we're
15 honest with ourselves, hard to clean up third-party stores
16 without writing a check of some kind."

17 Right?

18 A. It says that, yes.

19 Q. So the team recommendation was not to just come out of the
20 gate with money, "Let's just wait for Samsung to bring it up,"
21 but "We're going to have to shell out some money for this";
22 right?

23 A. That is what's written here.

24 Q. Bottom of page 2 and onto page 3, there's this
25 nonstorified version of what's going on in this deal. Do you

1 see it?

2 A. I do.

3 Q. And that's the internal part, this is what's really going
4 on within Google for the business to read this document; right?

5 A. I have no idea what "nonstorified" means actually.

6 Q. We'll keep going. Maybe it will give us some clues.

7 But the nonstorified version here has categories and then
8 it has "Google Gives" and "Samsung Gives" and "Google Gets" and
9 "Samsung Gets." Do you see that?

10 A. I do, yes.

11 Q. Item Number 2 here in this chart, the nonstorified
12 version, says (as read):

13 "Samsung's Zone in Play replaces Galaxy Store."

14 Do you see that?

15 A. I do.

16 Q. This was a proposal to have Samsung be a storefront within
17 the Google Play Store instead of a standalone app store;
18 correct?

19 A. I'm not sure I'd call it a proposal; but, yes, it's listed
20 in this table as an option, I guess.

21 Q. Well, it's a part of this deal according to the heading;
22 right?

23 A. I don't know if it ever -- I'm not sure if this was
24 stating the deal or things that the team should talk about in
25 terms of options for a deal.

1 Q. Either way, let's agree, though, that what this is talking
2 about is the Samsung being a storefront within the Google Play
3 Store instead of a standalone app store; right?

4 A. It appears to be.

5 Q. I'm sorry. I didn't hear you.

6 A. It appears to be.

7 Q. It appears to be. Thank you. I keep trying to look at
8 the transcript. That's what I'm doing over there.

9 A. It's all good.

10 Q. Okay. Now, the Google get for this proposal is no
11 Galaxy Store; right?

12 A. Yes, that's what's written here.

13 Q. And the Samsung get is stop wasting resources on the
14 Galaxy Store; right?

15 A. That is what's written here.

16 Q. Let's go to page 4.

17 This document goes on to some possible Samsung-facing
18 versions of the story to tell Samsung; right? You see "Story
19 1." Do you see it?

20 A. I do.

21 Q. So this is how Google might pitch the deal to Samsung,
22 what story they might tell to Samsung; right?

23 A. Potentially, yes.

24 Q. Five bullets down we have a bullet there that says --
25 starts "We're motivated." Do you see that?

1 A. Yes.

2 Q. And Item C within that says (as read):

3 "Samsung phases out Galaxy Store."

4 Do you see it?

5 A. I do.

6 Q. And just under that, it says "Unsaid." So there's the
7 unspoken part of this story that there may be some economic
8 value exchanged. Do you see that?

9 A. Yes.

10 Q. All right. So Story 1 is a proposal for Samsung to phase
11 out the Galaxy Store, just not totally being right away with
12 the money; right?

13 A. Yes, I think that's right.

14 Q. All right. Story 2, page 5. This one doesn't really talk
15 about what they are and are not going to say about money, but,
16 again, we see five bullets down Item B, again we have "Samsung
17 phases out Galaxy Store"; right?

18 A. Yes.

19 Q. All right. Now let's jump back forward -- jump back
20 forward -- jump forward to 2019 when you wrote about this
21 second tactic. Are you with me?

22 A. Yes, I am.

23 Q. And Project Banyan was part of this second tactic; right?

24 A. Project Banyan was part of the second...

25 Q. We can pull it back up.

1 A. It was related yes.

2 Q. It was related; right?

3 A. Yes. The topic I was writing about and Project Banyan
4 were interrelated.

5 Q. Right. And, in fact, you say this is Samsung there?

6 A. Yes.

7 Q. Okay. And you -- you're aware that Google, in fact,
8 proposed paying Samsung \$50 million per year to effectively
9 close the Samsung Galaxy Store; right?

10 A. No. I recall there being a deal that included \$50 million
11 a year. I don't recall that it involved closing the Samsung
12 Galaxy app store actually.

13 Q. I'll try it a slightly different way.

14 Google offered to pay Samsung \$50 million a year for
15 four years to make the Galaxy Store a storefront subsumed
16 within Google Play that would use Google Play Billing. Does
17 that sound familiar?

18 A. I actually don't recall it being like that, no. I recall
19 it -- that it was a separate storefront that used some
20 Google Play infrastructure is my recollection of it.

21 Q. Okay. That's close enough to I think what I said.

22 So there was going to be a Samsung storefront within the
23 Google Play infrastructure?

24 A. I think you said within the Google Play Store, which I
25 think is different to having a distinct app and using some of

1 our infrastructure.

2 Q. Okay. But the infrastructure was going to be the apps
3 were going to be distributed through Google Play and
4 Google Play Billing was going to be used to process payments?

5 A. Yes. I don't remember the specifics of what layers of our
6 infrastructure, but there was some discussion around an option
7 for that.

8 Q. All right. Let me try to come at it from the other side
9 then.

10 Whatever that was going to look like, the Galaxy Store was
11 not going to be an independently run app store on Samsung
12 devices under that proposal?

13 A. I think it depends on what your definition of "run" is
14 here. They would still be developing that storefront. They
15 would still be merchandising it. They would still be running
16 deals.

17 Q. Okay.

18 A. They would be using some of our infrastructure.

19 Q. All right. But they wouldn't be doing app distribution or
20 in-app payment billing processes?

21 A. Yes. I think some of the files would come from Google's
22 servers and infrastructure, and I think -- I can't remember the
23 specifics around billing, to be honest.

24 Q. All right. Let's look at Exhibit 588, please, in your
25 binder.

1 A. (Witness examines document.)

2 Q. This is an e-mail from you on March 26, 2019. Do you see
3 that?

4 A. Just bear with me. Sorry. 588?

5 Q. 588. Thank you.

6 A. (Witness examines document.) Yes.

7 Q. That's an e-mail from you on March 26, 2019?

8 A. Yes.

9 MS. MOSKOWITZ: Your Honor, move to admit Exhibit 588.

10 MR. KRAVIS: Again, no objection to the admission of
11 the exhibit. Object to the line of questioning as cumulative.

12 THE COURT: Overruled and admitted.

13 (Trial Exhibit 588 received in evidence.)

14 BY MS. MOSKOWITZ:

15 Q. All right. There's an e-mail here from you that says "In
16 terms of the Samsung proposal..." Do you see that?

17 A. Yes.

18 Q. "I realize Jim" -- that's Jim Kolotouros; right?

19 A. Yes, I believe so.

20 Q. And so there was a \$50 million a year number. That's
21 referring to the Samsung proposal; right?

22 A. Yes.

23 Q. All right. And you thought it would be helpful to put
24 that into perspective. You ask (as read):

25 "What would that be in terms of a rev share number

GENNAI - CROSS / MOSKOWITZ

1 recognizing that we might prefer to hide it in some way?"

2 Do you see that?

3 **A.** I do.

4 **Q.** So you were asking about what the rev share would be as a
5 way to hide the \$50 million in annual payments that were being
6 proposed; right?

7 **A.** No. I think I'm asking the opposite. I'm asking my team
8 to tell me what the 50 million would look like as a rev share
9 recognizing that we would offer it to Samsung as 50 million.

10 **Q.** So you were going to hide the rev share cut?

11 **A.** We just wouldn't -- it wouldn't be something that we would
12 give to them in the contract. I was sort of with Jim on the --
13 like, I recognized with Jim --

14 **Q.** So you don't actually know, or you don't actually remember
15 what you meant by "hide it in some way"; correct?

16 **A.** I'm saying here that Jim --

17 **Q.** No. I'm asking a different question.

18 You don't remember what you meant by you would prefer to
19 hide it in some way, do you?

20 **A.** I'm trying to answer your question.

21 **MS. MOSKOWITZ:** Your Honor, page 176, please.

22 **THE COURT:** Line?

23 **MS. MOSKOWITZ:** 23 to 25, please.

24 (Pause in proceedings.)

25 **THE COURT:** Yes, that's fine.

1 BY MS. MOSKOWITZ:

2 Q. (as read):

3 "QUESTION: So you don't recall why you would prefer to
4 hide it in some way?

5 "ANSWER: No."

6 Did I read that correctly?

7 A. You did.

8 Q. So you go on to say that you note that you do think a rev
9 share would be better at disincentivizing other app stores from
10 being preloaded given it would defray revenues, which is why
11 you liked the idea of offering rev share. Do you see that?

12 A. I do, yes.

13 Q. So you thought a revenue-share-type payment would be
14 better at disincentivizing OEMs from preloading other app
15 stores; right?

16 A. Not inclusive of their own, yes. We're talking about the
17 Samsung deal here that had the Galaxy Store.

18 Q. You thought that offering rev share would disincentivize
19 OEMs from preloading any app store other than Google Play;
20 correct?

21 A. No. I don't think that's what I'm saying here, no.

22 Q. Okay. You know that that's, in fact, what Google ended up
23 doing in the premier tier of RSA 3.0, though; right?

24 A. Sorry. Can you restate that question?

25 Q. Yeah. I'm going to ask you again if I can.

1 You know that that is, in fact, what Google ended up doing
2 in the premier tier of RSA 3.0, preventing and disincentivizing
3 OEMs from preloading any other app store, including their own,
4 other than Google Play?

5 **A.** On devices where the OEM chose for that to be the case,
6 yes.

7 **Q.** Right. You gave them a rev share to disincentivize them
8 from preloading any app store, including their own, other than
9 Google Play; right?

10 **A.** We gave them an incentive to build a Google-forward
11 device, yes, and the Google-forward device promoted our
12 applications.

13 **Q.** I'm going to ask you again. Under the premier tier in
14 RSA 3.0, Google paid OEMs' rev share to disincentivize them
15 from preloading any app store, including their own, other than
16 Google Play. That's correct; right, sir?

17 **A.** Yes, the terms of the agreement said that they wouldn't
18 preload another app store.

19 **Q.** So because Samsung and OEMs would have to give up revenue
20 share if they wanted to offer an alternative app store, their
21 own or anyone else's, they would have to factor in the lost
22 revenue share from the Google Play Store into the economics of
23 what that would look like; right?

24 **A.** Yes, another app store would have to compete on a similar
25 basis.

1 Q. And the OEMs would have to think really carefully about
2 what they could make by competing and what they could get by
3 just going with the exclusivity in Google Play?

4 A. OEMs are building any number of devices. They're making
5 decisions on a -- like on a --

6 Q. I understand that, sir. I'm actually --

7 A. -- model-by-model basis.

8 Q. -- now asking about that.

9 A. It's hard to answer your question in the aggregate.

10 Q. Okay. I'm going to try one more time.

11 In terms of an OEM's decision-making process, even for the
12 subset of devices we're talking about of whether to enroll in
13 the RSA 3.0 premier tier or not, they have to factor in how
14 much they think they could make by actually competing at the
15 app store level versus how much revenue share they think
16 they're going to get that Google will pay them for not
17 competing on app stores; isn't that right? That's the
18 economics they have to factor in?

19 A. I don't -- I don't remember the deals well enough to
20 answer this in specific levels of detail, but I recall there
21 being OEM carve -- OEM app store carve-outs in some instances.

22 Q. Project Banyan ended at some point you think?

23 A. Yes.

24 Q. And, in fact, it happened -- that happened after Samsung
25 sent back a term sheet back to Google saying that the goal of

1 how they understood it was to prevent unnecessary competition
2 on app store. Do you remember that?

3 **A.** I remember that happening.

4 **Q.** That happened in June of 2019?

5 **A.** I don't remember the specific month.

6 **Q.** Do you remember three days later as part of a long-term
7 strategy e-mail that you wrote, that you thought one solution
8 for Google to think through was a closer partnership with or
9 acquisition of Samsung?

10 **A.** I think I've written things like that before.

11 **Q.** You've written that before; right?

12 **A.** I don't know the exact words.

13 **Q.** So Project Banyan was supposedly coming to a close. Your
14 big idea was to enter into a close partnership with or to buy
15 Samsung?

16 **A.** I'm not sure I was being realistic, but if you're
17 espousing options, that's an option.

18 **Q.** Well, let's talk about how real it got.

19 In 2020, you understand that Google did, in fact, enter
20 into a set of Revenue Share Agreements with Samsung to pay them
21 \$8 billion a year, do you not?

22 **A.** I don't know the number. I remember there was a
23 renegotiation of contracts at that point.

24 **MS. MOSKOWITZ:** I pass the witness, Your Honor.

25 **THE COURT:** Brief redirect.

GENNAI - REDIRECT / KRAVIS

1 **MR. KRAVIS:** Thank you, Your Honor.

2 **REDIRECT EXAMINATION**

3 **BY MR. KRAVIS:**

4 **Q.** Mr. Gennai, I'd like to just ask you about a couple of the
5 documents you were shown on cross-examination. I'd like to
6 start with Exhibit 2903.

7 Can we pull that up, please? I believe it's in evidence.

8 Mr. Gennai, do you remember being asked about this
9 document and the lack of references to app stores in some of
10 the slides you were shown?

11 **A.** I do, yes.

12 **Q.** All right. I'd like to turn your attention now to page 26
13 of the document, please.

14 Do you see there where it says "Top barriers to
15 considering another OS"?

16 **A.** I do.

17 **Q.** And you see below that it says "Android purchasers"?

18 **A.** Yes.

19 **Q.** Could you read the fourth item down in the description
20 under "Android Purchasers"?

21 **A.** Yes. (as read):

22 "Prefer Google Play apps over Apple App Store apps."

23 **Q.** Would you look at the next page, 27, please?

24 Do you see it says "Reasons for switching from previous
25 OS"?

GENNAI - REDIRECT / KRAVIS

1 **A.** Yes.

2 **Q.** And, by the way, "OS" here refers to is it operating
3 system?

4 **A.** That's correct.

5 **Q.** Can you take a look at the -- starting on the left-hand
6 side the third reason for switching from previous OS listed
7 here?

8 **A.** It's "Poor selection of apps to choose from."

9 **Q.** And I'm going to give you just one more example. Can you
10 look at page 39 for me, please?

11 And do you see where it says "Positive influence of apps
12 on device purchase decision"?

13 **A.** I do, yes.

14 **Q.** I'm going to ask you to start at the left, go over for me
15 please -- one, two, three, four, five, six -- seven in from the
16 left. Can you read that, please?

17 **A.** Yes. (as read):

18 "Store to download apps and games; for example,
19 Google Play, Apple App Store."

20 **Q.** Now, you were shown some notes, I think they were
21 Exhibit 606, about meeting with Samsung back in 2016. Do you
22 remember that?

23 **A.** I do, yes.

24 **Q.** And in particular, shown some references in the notes to
25 possible options related to the Galaxy Store?

GENNAI - REDIRECT / KRAVIS

1 A. Yes.

2 Q. To this day, is the Samsung Galaxy Store available on
3 Samsung phones?

4 A. Yes.

5 Q. And is the Samsung Galaxy Store, like, part of the Google
6 Play Store or anything like that?

7 A. No.

8 Q. Last one I want to ask you about, if you could look back
9 at Exhibit 136 with me, please.

10 And if we could turn to page 3 or Slide 3, please.

11 Okay. Do you remember you were asked some questions about
12 some language that appears on this slide that is consistent
13 with the language in the notes document you were looking at?
14 Do you remember that?

15 A. Yes.

16 Q. Is all of the language on this slide drawn from your
17 notes?

18 A. It certainly does not appear to be.

19 Q. I want to direct you to the bottom left-hand corner. Do
20 you see where it says "Impact"?

21 A. Yes.

22 Q. Can you read for me the second bullet, please?

23 A. (as read):

24 "Android to iOS churn due to fractured app
25 distribution and security risks on Android."

PROCEEDINGS

1 Q. And what is "Android to iOS churn"?

2 A. That is when an Android user -- a user that owns an
3 Android phone buys a new phone and they buy an iPhone.

4 Q. And this was a deck about Project Hug?

5 A. Yes, that's right.

6 MR. KRAVIS: Thank you. I have no further questions.

7 THE COURT: Who's next?

8 Just stay there, please.

9 Who's next?

10 MR. KRAVIS: Your Honor, our next witness will be Matt
11 Weissinger, an Epic employee.

12 THE COURT: A video?

13 MR. KRAVIS: No. It's a live witness.

14 THE COURT: I'm wondering if you would like to do an
15 early lunch, Jury? Is that okay? Are you comfortable with
16 that? It won't be a longer lunch; it will be an earlier lunch.

17 Okay. Let's do that. So we'll be back about 12:15.

18 Okay?

19 THE CLERK: All rise.

20 (Proceedings were heard out of the presence of the jury:)

21 THE COURT: Will you put up 591?

22 Do you see the top upper -- very top of the document,
23 Mr. Gennai?

24 THE WITNESS: Gennai.

25 THE COURT: Gennai. Yes. I'm sorry. There's been a

1 lot of witnesses. It's not you, it's me.

2 So you wrote each and every word in this document? You
3 typed all this in?

4 **THE WITNESS:** I believe so, yes.

5 **THE COURT:** Why did you put "Privileged and
6 Confidential" at the top of this?

7 **THE WITNESS:** I would have spoken to a lawyer about
8 it.

9 **THE COURT:** Well, who?

10 **THE WITNESS:** I don't recall.

11 **THE COURT:** Why would you have spoken to a lawyer
12 about it?

13 **THE WITNESS:** It was talking about contracts, things
14 like Hug where we had legal advice that was coming in on a
15 regular basis, and the Samsung work.

16 **THE COURT:** Where are you asking for legal advice in
17 these personal notes you made?

18 **THE WITNESS:** I would have organized the meeting.

19 **THE COURT:** Okay. I'm having trouble understanding.
20 You initially said these were notes you kept just for yourself.

21 **THE WITNESS:** Yes.

22 **THE COURT:** It turned out they were circulated later
23 to some managers. That's fine. But now you're saying you
24 wrote these down to consult with a lawyer?

25 **THE WITNESS:** I would have -- I would have wanted to

PROCEEDINGS

1 chat with a lawyer to make sure that what I was writing
2 about -- in some areas I just wasn't at the level of depth, and
3 I would want to make sure I would go back and get this right,
4 this kind of document. Because even if it was for myself, I
5 wanted the record of it to be correct.

6 **THE COURT:** And you don't know who you talked with for
7 legal advice?

8 **THE WITNESS:** Not specifically.

9 **THE COURT:** Do you know whether you actually did talk
10 to a lawyer for legal advice with respect to Exhibit 591?

11 **THE WITNESS:** I'm pretty careful about putting that
12 kind of language on a document if I'm not speaking to a lawyer.

13 **THE COURT:** Well, do you remember or not that you
14 actually spoke to a lawyer about 591?

15 **THE WITNESS:** I'm not sure I could answer firmly yes,
16 but I would very much assume I did.

17 **THE COURT:** Here's the answer: Yes, no, I don't
18 recall.

19 Now, do you remember specifically that you actually spoke
20 to a lawyer about Exhibit 591?

21 **THE WITNESS:** Then I'll have to say I don't recall.

22 **THE COURT:** And what is it about this document that in
23 your view involves any issue of legal advice?

24 **THE WITNESS:** That it relates to contracts like Hug,
25 which were -- you know, we had contract lawyers working on the

PROCEEDINGS

1 Android team. There was the Samsung component of it that was
2 the component of it related to the business model. Those sorts
3 of projects had, you know, substantial amount of legal advice
4 associated with them.

5 **THE COURT:** Was it your practice that any document you
6 ever wrote that involved a contract, you would always just put
7 "Privileged and Confidential" on the top?

8 **THE WITNESS:** I don't think I would say every document
9 I wrote related to contracts; but, like, specifically with
10 contracts because we had a lawyer that was --

11 **THE COURT:** No, no. I'm sorry. I may have confused
12 you.

13 Every time you actually wrote about a contract, like you
14 did in 591, did you always put "Privileged and Confidential" at
15 the top of that document?

16 **THE WITNESS:** I don't think I could say yes to that
17 question, but the vast majority of times I think, yes.

18 **THE COURT:** Regardless of whether you actually talked
19 to a lawyer about it later?

20 **THE WITNESS:** The conversation may not necessarily
21 happen in the document. It would generally happen in a
22 meeting.

23 **THE COURT:** Okay. All right. You may step down.

24 (Witness excused.)

25 **THE COURT:** I'll see you at 12:15.

1 **MR. POMERANTZ:** Your Honor, may I have one --

2 **THE COURT:** Oh, sure.

3 You can step down.

4 **MR. POMERANTZ:** It doesn't involve you, Mr. Gennai.

5 You can step down.

6 So on that witness, our direct was 27 minutes.

7 **THE COURT:** Was what?

8 **MR. POMERANTZ:** Was 27 minutes.

9 **THE COURT:** Yes. I'm saying "yes." I don't know.

10 **MR. POMERANTZ:** I'm asking you to trust me on this
11 one.

12 **THE COURT:** Yes, I'm agreeing with you. Okay.

13 **MR. POMERANTZ:** And Epic's cross was 82 minutes. We
14 have an agreement that we're trying to get this done by
15 tomorrow, and that was way longer than we were anticipating.

16 **THE COURT:** You didn't talk about this?

17 **MR. POMERANTZ:** We always try -- yes, we always try to
18 work with each other to kind of, you know, have rough
19 estimates, and this was way longer.

20 And so we would ask Your Honor to consider how to take
21 care of that. Certainly one option is to cut their rebuttal
22 either entirely or certainly dramatically shorter because
23 they're the ones who have created this problem for us now over
24 the next day and a half.

25 **THE COURT:** Okay.

1 **MR. POMERANTZ:** And I think it's unfair for them to
2 have taken so much time this morning when we are the -- it's
3 our case now, and they are basically -- you know, they've had,
4 I think, more than 50 percent more hours already in this case,
5 and now they're basically taking away time that we need to
6 finish our case in just two days.

7 **THE COURT:** Let me be clear. There has not been a
8 sharp dividing line between plaintiff's case and defendant's
9 case. That has not been the case. You have things you want to
10 do now, but it's not like your case just started Monday.
11 That's not true.

12 **MR. POMERANTZ:** No. What I'm talking about --

13 **THE COURT:** It started the day I seated the jury.

14 **MR. POMERANTZ:** We know how many hours we --

15 **THE COURT:** So you each have had equal time to present
16 your cases, but let's talk about this.

17 So what are you going to do? What do you want to do.

18 **MR. BORNSTEIN:** Excuse me, Your Honor.

19 What I would have expected is I would have had the
20 opportunity to speak with Mr. Pomerantz rather than being
21 blindsided.

22 **THE COURT:** We're doing now. Let's just --

23 **MR. BORNSTEIN:** Sure. Look, I don't think there's any
24 reason that we should be required to or will need to cut the
25 rebuttal. I, frankly, think that was time very well spent

1 given the content of the testimony, which we also did not
2 anticipate. It was very fruitful.

3 But I do think that it is important that we have the
4 opportunity to have the rebuttal from our economists for all
5 the reasons we've discussed; and if we -- I don't want to do
6 this, I don't think we need to do it. We could have that
7 happen on a subsequent day. I don't want to --

8 **THE COURT:** No, no. We're not doing that.

9 **MR. BORNSTEIN:** I understand, Your Honor.

10 **THE COURT:** You-all both assured me this was going to
11 happen, and I have told the jury. We're not backhoing. Okay?

12 **MR. BORNSTEIN:** Absolutely.

13 **THE COURT:** Now, I understand what Mr. Pomerantz is
14 saying. For the next person, how long are you ballparking your
15 exam?

16 **MR. BORNSTEIN:** The next person is an Epic person, and
17 we anticipate being very brief with -- in fact, both of the
18 next two live witnesses are Epic employees being called by
19 Google. We do not have, and I'll tell everybody in the
20 courtroom, we do not have big exams planned. We'll do some
21 cleanup examination based on whatever it is Google does, but we
22 do not anticipate and we don't have ready to go canned directs.

23 **THE COURT:** All right.

24 **MR. POMERANTZ:** And we anticipated that, Your Honor,
25 in the timing of all of this. We anticipated that they would

PROCEEDINGS

1 have very short, friendly crosses, I think is what
2 Mr. Bornstein called it this morning. So that was already
3 anticipated. What wasn't anticipated was an 82-minute
4 cross-examination here this morning, and it's really going to
5 crunch things up over the next day and a half.

6 **THE COURT:** Well, why, though? I mean, they're
7 going -- I mean, okay, it may have been a little long in terms
8 of your discussions of allocation, but it's 11:45 on Thursday.
9 We've got the rest of the day and then all day tomorrow, so...

10 **MR. BORNSTEIN:** We also spent quite a long time
11 yesterday on videos, Your Honor.

12 **THE COURT:** All right. Here, I'm -- is it
13 Dr. Bernheim who's going to be the rebuttal?

14 **MR. BORNSTEIN:** Yes, Your Honor.

15 **THE COURT:** You said 45 minutes yesterday?

16 **MR. BORNSTEIN:** I did.

17 **THE COURT:** Just shoot for 30. Okay? You should be
18 able to do it.

19 **MR. BORNSTEIN:** Understood.

20 **THE COURT:** Okay. All right. You can have a little
21 chat over lunch too if you want.

22 **MR. BORNSTEIN:** Thank you, Your Honor.

23 **THE CLERK:** All rise. Court's in recess.

24 (Luncheon recess was taken at 11:47 a.m.)

25 **AFTERNOON SESSION**

12:29 p.m.

WEISSINGER - DIRECT / BELL

(Proceedings were heard in the presence of the jury:)

THE COURT: Okay.

THE CLERK: Stand and raise your right hand.

MATTHEW REED WEISSINGER,

called as a witness for the Defendant, having been duly sworn,
testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Please be seated.

THE COURT: Go ahead.

MS. BELL: Thank you, Your Honor.

Good afternoon.

THE COURT: Oh, sorry.

THE CLERK: Please state your full name for the Court
and spell your last name.

THE WITNESS: Oh, sure. Matthew Reed Weissinger.
Last name W-E-I-S-S-I-N-G-E-R.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MS. BELL:

Q. Good afternoon, Mr. Weissinger. I'm Lauren Bell on behalf
of Google.

You joined Epic Games in 2016; right?

A. That's correct.

Q. And when you were hired, you were hired as the director of
marketing; right?

1 A. That's correct.

2 Q. And since then, you've been promoted to vice president of
3 marketing; right?

4 A. Yes.

5 Q. And we've heard, of course, that Epic launched Fortnite
6 on iOS in March of 2018; right?

7 A. That's correct.

8 Q. And it waited five months later before it launched on
9 Android in August 2018; right?

10 A. That's correct.

11 Q. And, now, when Epic launched Fortnite on iOS in March,
12 it was a very popular game; right?

13 A. Yes, correct.

14 Q. And when it was on iOS, it had approximately 2.5 million
15 daily active users; isn't that right?

16 A. I'm not sure of the exact amount.

17 Q. Is that approximately correct?

18 A. It sounds right.

19 Q. And, in fact, you characterized Fortnite's launch on iOS
20 as a cultural phenomenon; right?

21 A. That's correct.

22 Q. And Fortnite enables users to build social connections
23 within the game; correct?

24 A. Yes, it does.

25 Q. And those Fortnite users can build these social

1 connections within the game even when users are on different
2 platforms; right?

3 **A.** Yes. Yes, it can.

4 **Q.** And it's not a good -- right? -- when Fortnite users can't
5 make the connection because of the platform that they use;
6 right?

7 **A.** I'm sorry. Would you mind repeating that?

8 **Q.** It's bad when Fortnite users can't make those social
9 connections just because of something like using a different
10 platform; right?

11 **A.** In general, yes.

12 **Q.** Now, Fortnite's core demographic is users aged 13 to
13 25 years of age; right?

14 **A.** Yes.

15 **Q.** And it's fair to say 13-, 14-year-olds, that group, that's
16 an age range that's not known for great impulse control or
17 waiting for the next cool thing; right?

18 **MS. MOSKOWITZ:** Objection. MIL.

19 **THE COURT:** He's not an expert in impulse control in
20 that age group.

21 So next question, please.

22 **BY MS. BELL:**

23 **Q.** When Fortnite first launched on consoles, it grew very
24 fast in the console ecosystem; right?

25 **A.** Yes, it did.

1 Q. It had about -- or it has now approximately 80 to
2 90 percent of the console base; right?

3 A. I'm not sure of the precise number today.

4 Q. That's approximately correct, though, the 80 to
5 90 percent; right?

6 A. I -- actually, I'm not sure.

7 Q. You're aware that the retention of Fortnite players are on
8 mobile platforms though. So switching from console to mobile,
9 that the retention of Fortnite players on mobile platforms is
10 lower than the retention on other platforms; right?

11 A. In general, yes.

12 Q. If you could please look in your binder at Exhibit 10521.

13 A. (Witness examines document.) Okay.

14 Q. And you recognize this exhibit as material that was
15 prepared by Epic employees in the normal course of business;
16 right?

17 A. Yes.

18 MS. BELL: Your Honor, I move to admit Exhibit 10521.

19 MS. MOSKOWITZ: No objection.

20 THE COURT: Okay. It's admitted.

21 (Trial Exhibit 10521 received in evidence.)

22 BY MS. BELL:

23 Q. If we could please turn to Slide 3, and it should be on
24 your screen as well.

25 This slide presents information as of February 15, 2020;

1 right; you see at the bottom?

2 A. Yes, that's correct.

3 Q. And at the top of the page, the first subbullet says that
4 "Mobile drives new accounts"; right?

5 A. Yes.

6 Q. And Epic views the mobile platform as the platform with
7 the biggest growth potential for Fortnite; right?

8 A. That's correct.

9 Q. But Epic has had to work much harder to reach the mobile
10 ecosystem and retain those users; right?

11 A. We work hard regardless.

12 Q. Well, when Epic talks about retaining Fortnite users,
13 that's what we're talking about when we talk about Fortnite
14 users continuing to play the game; right?

15 A. Would you mind repeating that?

16 Q. When you think about retaining Fortnite users, you're
17 thinking about retaining users so that they continue to play
18 Fortnite; right?

19 A. Yes.

20 Q. So a low retention rate would mean that Epic keeps fewer
21 users, and a higher retention means it keeps more users; right?

22 A. In general, yes.

23 Q. And so if we're looking here at page 3, as of the date of
24 this slide, mobile retention on iOS and Android was less than
25 on PlayStation, Xbox, and Nintendo Switch; right?

1 **A.** Correct.

2 **Q.** And Android retention rates for Fortnite players in
3 February 2020 was only about 4 percent; right?

4 **A.** That's correct.

5 **Q.** And when this slide was created in February 2020, Fortnite
6 was not yet on the Google Play Store; right?

7 **A.** That's correct.

8 **Q.** And are you aware that Mr. Sweeney testified that when
9 Fortnite launched on Android in 2018, it was a depressing
10 process because after the first few weeks, the rate of users
11 installing Fortnite dropped dramatically below the rate that
12 Epic had expected?

13 **A.** I'm not sure what Tim testified.

14 **Q.** Well, the numbers that we're seeing on this screen support
15 that; right?

16 **A.** Would you mind repeating that once more?

17 **Q.** The low mobile retention that we're seeing on the screen
18 supports the concept that this was a depressing launch for
19 Fortnite; right?

20 **A.** It was not what we hoped for.

21 **Q.** Let's turn to another section of the presentation at
22 Slide 38, and let's talk about revenue.

23 You can also look at the monitor, sir, if that's helpful.

24 **A.** Okay.

25 **Q.** And this slide's titled "Revenue by First Seen Platform

1 Percentage"; right?

2 **A.** Yes.

3 **Q.** And the chart represents the platform where the Fortnite
4 player is first seen and the platform where those users
5 eventually make purchases; right?

6 **A.** That's correct.

7 **Q.** So the way you read this chart is that the rows along the
8 left identify the platform where a Fortnite player first played
9 the game; right?

10 **A.** That's correct.

11 **Q.** And the columns that go across the top show what platform
12 the Fortnite player actually makes a purchase on Fortnite;
13 right?

14 **A.** That's correct.

15 **Q.** So if we look at the Android row near the bottom, this
16 reflects players who played on Android but ended up making a
17 purchase across these different columns; right?

18 **A.** Who first played on Android and then made a purchase on
19 the various platforms.

20 **Q.** And so the players who first started playing Fortnite on
21 Android, 34.8 percent of those players made a purchase using
22 PlayStation 4; right?

23 **A.** I don't think that's the right way to interpret that.

24 **Q.** The players in that first column for Android reflect the
25 players who first played Fortnite on Android; right?

1 **A.** Correct.

2 **Q.** And 34 percent of them then made a purchase using
3 PlayStation 4; right?

4 **A.** I don't think that's the right way to interpret that.

5 **MS. BELL:** Your Honor, if we could look at Tab A of
6 the binder.

7 **THE COURT:** Which tab?

8 **MS. BELL:** Tab A.

9 **THE COURT:** Oh, A.

10 Okay, yep. Which page?

11 **MS. BELL:** Page 111.

12 **THE COURT:** Lines?

13 **MS. BELL:** Line 24 to page 114, line 14 -- I'm
14 sorry -- page -- until the next page 112, lines 1 through 7.

15 **THE COURT:** Yeah, that's fine.

16 **MS. BELL:** Mr. Nickels, can you put it on the screen,
17 please?

18 **BY MS. BELL:**

19 **Q.** You were asked at deposition where you gave testimony,
20 correct, that (as read):

21 "Right. So sticking with the Android row, the first
22 column, PlayStation 4, 34.8 percent for players first seen
23 on Android, 34.8 percent of their spending is on
24 PlayStation 4. Is that how you interpret the 38.4 -- the
25 34.8 percent?"

1 And your answer was (as read):

2 "I think you can for this point in time."

3 **A.** That's correct.

4 **Q.** So let's turn back to the exhibit and move to the next
5 column.

6 Can we now agree that if you look at the next column for
7 Android, of the players who first started playing Fortnite on
8 Android, 18.9 percent of those players eventually made a
9 purchase playing Fortnite on Xbox; right?

10 **A.** That is not the correct way to interpret this.

11 **Q.** And, sir, let's go over to the last column for Android.

12 Of the players who first started playing Fortnite on
13 Android, 5.3 percent of those players made a purchase playing
14 Fortnite on an iOS device; right?

15 **A.** Again, that's not the correct way to interpret this.

16 **MS. BELL:** Your Honor, if we may, Tab A, page 113.

17 **THE COURT:** Okay. Lines?

18 **MS. BELL:** Lines 17 to 25, and on the next page, the
19 first two lines.

20 (Pause in proceedings.)

21 **THE COURT:** Okay.

22 **BY MS. BELL:**

23 **Q.** You were asked (as read):

24 "And if we look at the iOS column and the Android
25 row, you see the number 5.3 percent?"

1 You answered: "Yes."

2 And then you were asked (as read):

3 "And for this column in this iOS row for this
4 snapshot, do you interpret the 5.3 percent to mean for
5 those users/player" -- "for those users/players first seen
6 on Android, 5.3 percent of their spending occurred on
7 iOS?"

8 You answered: "Yes."

9 Let's go back to the exhibit, please. And the very last
10 row -- the row for Android and the very last column for
11 Android.

12 Here we have 21.6 percent. Do you see that?

13 **A.** I do.

14 **Q.** And that means for the players who first started playing
15 Fortnite on Android devices, only 21.6 percent of those
16 players, their total purchases occurred on Android; correct?

17 **A.** I'm sorry. You said two different things there.

18 **Q.** For the players who first started playing on Android -- do
19 you understand that?

20 **A.** Yes.

21 **Q.** -- 21.6 percent is the percent of spending for that group
22 on Android. Do you agree?

23 **A.** That's correct.

24 **Q.** And for players first seen on Android, nearly 80 percent
25 of their eventual purchases did not happen on Android; right?

1 A. That's correct.

2 Q. It happened on other platforms. And if you look at the
3 bottom column for the grand total, you see that Fortnite's
4 grand total on Android is only 0.7 percent; right?

5 A. Correct.

6 Q. And Fortnite is earning billions of dollars; right?

7 A. That's correct.

8 Q. So clearly since Epic is earning billions of dollars on
9 Fortnite, Epic must have other routes besides the Google Play
10 Store for earning that money; right?

11 A. That's correct.

12 Q. As of 2021, we just -- Fortnite had a social media
13 presence of 100 million followers; right?

14 A. I believe that's correct, yes.

15 Q. And it even had a social media manager; right?

16 A. Yes.

17 Q. And as of 2021, it had even spent over a billion dollars
18 marketing Fortnite; right?

19 A. Over the life of the product, yes.

20 Q. And back on the social media presence, Fortnite's social
21 media presence was so large that even Apple asked Fortnite for
22 retweets and reshares of content because Fortnite content got a
23 ton of engagement; right?

24 A. That's correct.

25 Q. And so Epic can directly reach its own Fortnite users;

1 right?

2 **A.** In various ways, we can, yes.

3 **Q.** And if Epic wanted to notify its Fortnite users of a price
4 that exists outside of Google Play, it could just send messages
5 directly to its Fortnite users; right?

6 **A.** Not everybody follows our social channels. So, yes, you
7 can put pricing information out on our socials, but it's not
8 necessarily going to directly be sent to all of our players.

9 **Q.** Sir, my question was: Is it possible? And your answer,
10 it sounds like, is yes; correct?

11 **A.** No, it's not possible.

12 **Q.** It is not possible for Fortnite to reach players outside
13 of the Google Play Store? That's your testimony?

14 **A.** It is possible but not all of them with the exact pricing
15 information.

16 **Q.** And with 100 million social media followers, you can even
17 reach non-Fortnite users as well; right?

18 **A.** Yes.

19 **Q.** Let's talk about something called minimum specifications.
20 Are you familiar with that term?

21 **A.** Yes.

22 **Q.** Let's turn still in Exhibit 10521 to page 16.

23 And this slide is titled "Increase Compatible Android
24 Devices"; right?

25 **A.** Yes.

1 Q. And the goal here is to increase compatible Android
2 devices since that's the title; right?

3 A. I don't know if that's the goal of this slide, but it's
4 discussing, yes, increasing compatible Android devices.

5 Q. And the first line says that there is a gap between
6 FN Android and competitors. And "FN" stands for Android is
7 that right -- or "FN" stands for Fortnite?

8 A. Yes, that's correct.

9 Q. So there's a gap between Fortnite Android and competitors;
10 is that accurate?

11 A. Yes.

12 Q. So this table on the page lists three different games:
13 Fortnite, Call of Duty: Mobile, and PUBG: Mobile. Do you see
14 that?

15 A. I do.

16 Q. And Call of Duty: Mobile and PUBG: Mobile are the Fortnite
17 competitors where you want to close the gap on Android devices;
18 right?

19 A. Yeah, they were two mobile competitors of ours.

20 Q. And for the three games listed, the table shows that
21 Android min spec; right? Do you see that, the first row?

22 A. I do.

23 Q. And minimum specifications means what the device needs
24 just to be able to run the game; right?

25 A. In general, yes.

1 Q. And for the row labeled "Android Min Spec," the table
2 shows that Fortnite Mobile requires Android 8.0 or more while
3 Call of Duty and PUBG: Mobile require only Android 5.0 or more;
4 right?

5 A. That's correct.

6 Q. And that same row shows that Fortnite Mobile requires
7 3 gigabytes of ram while Call of Duty: Mobile and PUBG: Mobile
8 require only 2 gigabyte of ram; right?

9 A. That's correct.

10 Q. And then the next row down is "Estimated WW Device
11 Coverage"; right?

12 A. Yes.

13 Q. And "WW" stands for worldwide?

14 A. Yes.

15 Q. For Fortnite it was only 260 million devices; right?

16 A. That's correct.

17 Q. But for Call of Duty and PUBG, it's 2.6 billion devices;
18 right?

19 A. That's correct.

20 Q. And if we look over on the right side of the slide,
21 there's a graph with the title "Total Android Devices." Do you
22 see that?

23 A. I do.

24 Q. And there are three numbers on this graph. So the bottom
25 number is 260 million; right?

1 A. Correct.

2 Q. And this chart defines the 260 million devices, that means
3 the number of devices compatible with Fortnite at the time of
4 the slide; right?

5 A. That's correct.

6 Q. And this means that Android devices, that as of the time
7 of this slide's preparation, those are the numbers that a user
8 could actually play the game on; right?

9 A. That's correct.

10 Q. Meaning the rest of the devices you can't -- the device
11 itself doesn't let you play the game; right?

12 A. I'm not sure if that's correct.

13 Q. With a good quality experience?

14 A. In general, yes.

15 Q. And above that number the graph shows that there are
16 200 million, quote, "potential Fortnite-compatible devices";
17 right?

18 A. That's correct.

19 Q. And so that means that Android devices, that as of this
20 time, a user could potentially play on; right?

21 A. That's correct.

22 Q. The last number on this side is 2.14B or billion; right?

23 A. That's correct.

24 Q. And that represents that at the time of the slide, there
25 were 2.14 billion Android devices that a user could play these

1 other two games: Call of Duty or PUBG: Mobile; right?

2 A. Yes.

3 Q. But they can't play Fortnite on it; right?

4 A. That's correct.

5 Q. So fair to say, Fortnite only worked on a small fraction
6 of Android phones; right?

7 A. I wouldn't characterize it that way.

8 Q. Turning to page 17.

9 This slide discusses something called a funnel conversion;
10 right?

11 A. Yes.

12 Q. And a funnel conversion in this context measures the rate
13 at which potential new users become actual users; right?

14 A. I would phrase it a little bit differently but, in
15 general, yes.

16 Q. And so the funnels here show how many potential users drop
17 off at various points in the process of getting from thinking
18 about starting the game to actually getting into the game;
19 right?

20 A. Yes.

21 Q. And this slide shows that the funnel for Fortnite, quote,
22 "suffers from drop-offs from possible sideloading frictions and
23 high min spec"; right?

24 A. That's correct.

25 Q. And then below that it shows the drop-off at a few key

1 steps a user would go through in order to download Fortnite;
2 right?

3 **A.** That's correct.

4 **Q.** This slide shows that 37 percent of new users drop off
5 during the first measurement step of users who went from
6 clicking download to actually opening the Epic Games app;
7 right?

8 **A.** Yes, that 37 percent would abandon the process at that
9 point.

10 **Q.** And this 37 percent drop-off is for some reason. We don't
11 know from the slide what it is; right?

12 **A.** We have a very good idea.

13 **Q.** But it's not on the slide; right?

14 **A.** The warning is in the image.

15 **Q.** Okay. And so there are other reasons why users would drop
16 off at this point; right?

17 **A.** Perhaps.

18 **Q.** In fact, let's turn to, again, your exhibit to page 24,
19 please.

20 Do you see across the top it says (as read):

21 "Download and patching process remains a challenge on
22 Mobile due to Fortnite download size relative to
23 competitors"?

24 Do you see that?

25 **A.** I do.

1 Q. And on the right-hand side there are two bullet points,
2 and the second bullet point says (as read):

3 "FNs" --

4 That's Fortnite; right?

5 A. Correct.

6 Q. (as read):

7 "Fortnite's final download size is much bigger
8 causing first load to take longer than any download step
9 of any competitor."

10 Right?

11 A. That's what it says.

12 Q. And common sense, in your experience as a marketing
13 director, tells you that when things take longer, some people
14 are just going to give up; right?

15 A. That's correct.

16 Q. So let's turn back to that funnel on page 17, please.

17 Now let's move to the second drop-off point.

18 So there's another -- there's another 40 percent drop-off
19 between opening the Epic Games app and passing Fortnite's
20 minimum specifications check; right?

21 A. 40 percent after the initial 37 percent.

22 Q. To pass Fortnite's minimum specifications; right?

23 A. Correct.

24 Q. And, again, "min spec check" refers just to a check to
25 make sure that the game actually will work well on a user's

1 phone; right?

2 **A.** That's correct.

3 **Q.** So according to this chart, which is an Epic document,
4 40 percent of possible Fortnite users don't make it past the
5 minimum specifications check to make sure that the Fortnite app
6 will work well on their phones; right?

7 **A.** 40 percent drop off after an initial 37 percent have
8 already dropped off.

9 **Q.** And those two numbers, 40 percent who are dropping off
10 because of Fortnite is bigger than the 37 percent who might
11 drop off due to the size of the game or sideloading or
12 something else; right?

13 **A.** In terms of absolute players, no.

14 **Q.** 40 percent is bigger than 37 percent; correct?

15 **A.** As a number, yes.

16 **Q.** Let's talk about Project Liberty.

17 You handled the communication strategy for
18 Project Liberty, didn't you?

19 **A.** That's correct.

20 **Q.** And Epic was internally discussing ways to bypass
21 Google Play's commission as early as 2019; right?

22 **A.** Yes.

23 **Q.** In those internal discussions, employees at Epic told you
24 that the goal was to draw Google into a legal battle over
25 antitrust; right?

1 A. That's correct.

2 Q. And Epic also hired a PR consultant to assist with Epic's
3 communications for Project Liberty; right?

4 A. That's correct.

5 Q. That was a person named Lane Kasselmann at a firm called
6 Greenbrier?

7 A. Yes.

8 Q. And Epic initially paid Mr. Kasselmann a fee of \$100,000
9 for work; right?

10 A. I believe that's correct.

11 Q. And then Epic turned around and hired a firm called
12 Messina Group to help out with the PR as well; right?

13 A. Yes.

14 Q. And at that point, Epic spent 300,000 on Mr. Kasselmann and
15 the Messina Group; right?

16 A. That's correct.

17 Q. And that payment was partially to create a coalition of
18 developers; right?

19 A. Yes, that's correct.

20 Q. And Epic's reason for creating a coalition of developers
21 was because Epic knew that Epic by itself was not sympathetic;
22 right?

23 A. I believe that was part of it.

24 Q. I mean, after all, Epic is a very financially successful
25 company; right?

1 **A.** Correct.

2 **Q.** It's worth billions of dollars; right?

3 **A.** Yes.

4 **Q.** And it spent more than billions of dollars marketing
5 Fortnite. We just talked about that; right?

6 **A.** That's correct.

7 **Q.** And so Epic was concerned that there might be negative
8 reactions to Project Liberty whenever it became public; right?

9 **A.** That's correct.

10 **Q.** Let's turn, please, to Exhibit 7260 in your binder.

11 **A.** Okay.

12 **Q.** And do you recognize this as notes that you took in the
13 lead-up to Project Liberty?

14 **A.** Yes. This is basically a collection of various notes that
15 I would have put into an e-mail draft that probably represents
16 a number of different conversations.

17 **MS. BELL:** Your Honor, at this time I move to admit
18 Exhibit 7260.

19 **MS. MOSKOWITZ:** Your Honor, there is some embedded
20 hearsay, but no objection to being offered for a nonhearsay
21 purpose.

22 **THE COURT:** No. It's admitted.

23 (Trial Exhibit 7260 received in evidence.)

24 **THE COURT:** Go ahead.

25 **MS. BELL:** Thank you.

1 **BY MS. BELL:**

2 **Q.** You wrote in these notes near the bottom of the page (as
3 read):

4 "Our company is too successful to be sympathetic
5 about."

6 Right?

7 **A.** That's what I wrote.

8 **Q.** And you wrote (as read):

9 "It's a rich company versus rich company."

10 Do you see that?

11 **A.** I do.

12 **Q.** And what you're referring to here when you say "It's a
13 rich company versus a rich company" is that you're referring to
14 Google versus Epic; right? Two rich companies?

15 **A.** A billion versus a trillion, yes.

16 **Q.** And you understood that the press coverage might be
17 negative towards Epic; right?

18 **A.** Correct.

19 **Q.** And you realize that you, therefore, needed to pay money
20 for good public relations; right?

21 **A.** I wouldn't phrase it like that.

22 **Q.** I know. I phrased it, but do you agree that you paid
23 money for public relations to generate good public relations;
24 right?

25 **A.** In general, yes.

1 Q. And you and your PR firm decided to create a narrative
2 that Epic was benevolent; right?

3 A. Yes.

4 Q. And in this exhibit that we're looking at, about a third
5 of the way down the page these notes say (as read):

6 "Start to build a coalition (501c4). Publicly
7 announce the coalition and their mission."

8 Do you see that?

9 A. Yes.

10 Q. And this refers to a coalition of app developers Epic
11 eventually did create; right?

12 A. Would you mind repeating that once more?

13 Q. When you say here "Start to build a coalition," that
14 refers to a coalition that Epic did, in fact, end up creating;
15 right?

16 A. Yes. It was our idea.

17 Q. And Epic's coalition included some other app developers as
18 members; right?

19 A. Yes.

20 Q. And, in fact, you even called some of those members,
21 quote, "founding members"; right?

22 A. They were.

23 Q. But even though Epic called some of the members as
24 founding members, they actually were not members at the time of
25 the founding of the coalition; right?

1 **A.** If you're referring to the incorporation, then, no, they
2 were not.

3 **Q.** And Epic's hired consultant, the Lane Kasselman we were
4 just talking about, Lane Kasselman came up with the idea to
5 call them founding members; right?

6 **A.** I'm not sure about that.

7 **MS. BELL:** Your Honor, if we could, Tab B.

8 **THE COURT:** B. Okay.

9 **MS. BELL:** Page 193.

10 **THE COURT:** Lines?

11 **MS. BELL:** Lines 9 through 18. Actually, just 9
12 through 11.

13 **THE COURT:** Wait. 193, lines 9 to 11?

14 **MS. BELL:** Yes, Your Honor.

15 **THE COURT:** Oh.

16 (Pause in proceedings.)

17 **THE COURT:** Yeah, okay. That's fine.

18 **BY MS. BELL:**

19 **Q.** You were asked at your deposition (as read):

20 "Whose idea was it to call these other additional
21 members founding members?"

22 And you responded (as read):

23 "That would have been Lane and Tera."

24 **A.** That's correct.

25 **Q.** If we go back to Exhibit 7260, right after you mention

1 here having a public affairs agency help manage this new
2 coalition, you then wrote (as read):

3 "Come up with your list of advocacy points. Get rid
4 of the tax. Add some other issues."

5 Right?

6 **A.** That's what's written here, yes.

7 **Q.** And by "tax," you're referring to the app store commission
8 fees; right?

9 **A.** That's what I would have been referring to, yes.

10 **Q.** So here, the only initial advocacy point that you could
11 come up with was the financial one of getting rid of the tax;
12 right?

13 **A.** I'm not sure about that.

14 **Q.** And you and your PR team that Epic hired, you knew that
15 you should, quote, "add some other issues"; right?

16 **A.** That's what's written here.

17 **Q.** And on the next page -- well, sir, I didn't ask if that's
18 what's written there.

19 I'm asking you, that you and your PR team decided that you
20 needed to add some other issues; right?

21 **A.** There were already plenty of issues.

22 **Q.** That you needed -- on the next page -- let's go to the
23 next page -- you wrote (as read):

24 "We have employed a firm who can run the strategy for
25 us and build the coalition for us."

1 Do you see that?

2 A. I do.

3 Q. So then Project Liberty was eventually presented to Epic's
4 board of directors; right?

5 A. I believe so, yes.

6 Q. And a presentation was made that included information on
7 the communication strategy for Project Liberty; right?

8 A. I believe so.

9 Q. And as we just discussed, you handled the communication
10 strategy for Project Liberty; right?

11 A. That's correct.

12 Q. When Project Liberty was eventually presented to Epic's
13 board of directors, you used the same language, "get rid of the
14 tax"; right?

15 A. I believe that was in materials that I provided.

16 Q. If you could please turn to Exhibit 5528 in your binder.

17 A. Would you mind repeating that?

18 Q. 5528.

19 A. Thank you.

20 Q. Are you there?

21 A. Yes.

22 Q. Great.

23 This is a draft presentation created by Epic to update
24 Epic's board of directors; right?

25 A. That's what it looks like.

1 Q. And if you turn to page 12, please.

2 A. Okay.

3 Q. Do you see page 12 sets out the communication strategy?

4 A. I do.

5 MS. BELL: Your Honor, at this time I move to admit
6 Exhibit 5528.

7 MS. MOSKOWITZ: Objection to foundation for the
8 document.

9 THE COURT: 5528.

10 (Pause in proceedings.)

11 THE COURT: Why don't you try a little foundation.

12 BY MS. BELL:

13 Q. Sir, you acknowledge that this is an Epic document for
14 presenting to Epic's board of directors; right?

15 A. That's what it looks like.

16 Q. And you are the -- you were in charge of the communication
17 strategy for Project Liberty; right?

18 A. That's correct.

19 Q. And page 12 of this document sets out the communication
20 strategy for Project Liberty; correct?

21 A. That's correct.

22 MS. BELL: Your Honor, at this time I move to
23 Exhibit 5528 into evidence.

24 THE COURT: Did you write Exhibit 5528? Did you
25 prepare that?

1 **THE WITNESS:** This whole document? No.

2 **THE COURT:** Did you prepare page -- what was it? 12?

3 Did you prepare page 12, "Communication Strategy"?

4 **THE WITNESS:** Yeah, that looks like my work.

5 **THE COURT:** Okay. I'll admit only that one page.

6 **MS. BELL:** Thank you, Your Honor.

7 **THE COURT:** All right. So 5528 is admitted only with
8 respect to page 1 and page 12 as they're numbered as exhibits
9 and nothing else.

10 (Trial Exhibit 5528, pages 1 and 12, received in
11 evidence.)

12 **THE COURT:** Okay. Go ahead.

13 **BY MS. BELL:**

14 **Q.** Sir, you see the top bullet point states that Epic needs
15 to, quote, "create our policy points and establish them
16 publicly. Work with coms team and Greenbrier" --

17 That's your PR team; right?

18 **A.** That's correct.

19 **Q.** (as read):

20 -- "and Greenbrier to create a list of advocacy
21 points, get rid of the tax, and then along with some
22 additional issues to avoid a one-dimensional
23 argument."

24 Do you see that?

25 **A.** I do.

1 Q. And so Epic's strategy, as outlined here, was to come up
2 with some other issues so that it didn't sound one dimensional;
3 right?

4 A. That was part of it, yes.

5 Q. And then it says in the second bullet point that Epic
6 intended to work with its hired PR team at Greenbrier to,
7 quote, "develop research... then seed with press and run ads";
8 correct?

9 A. Yes, that's correct.

10 Q. So Epic wanted better economics, that's what is meant by
11 the tax, getting rid of the tax; right? I'm not asking about
12 the document. I'm asking about your personal knowledge. Epic
13 wanted better economics, financials. That's what was meant by
14 "get rid of tax"; right?

15 A. Correct.

16 Q. So Epic wanted those better financials and decided to,
17 quote, develop research and manufacture a press cycle that
18 included these other issues so they could hide that true
19 financial motive; right?

20 A. Incorrect.

21 Q. Now, when you talked about a Google tax, you meant the
22 30 percent commission fee that Google charges on Google Play;
23 right?

24 A. Would you mind repeating that once more?

25 Q. When you talk about a tax, a Google tax, you're talking

1 about the 30 percent commission rate that Google charges on
2 Google Play; right?

3 A. Yes.

4 Q. And that so-called tax is actually used to support the
5 entire Android ecosystem; right?

6 A. I'm not sure what it's used for.

7 Q. Well, let's leave Android and talk about Apple.

8 Apple also charges a 30 percent fee, right, for game
9 developers?

10 A. Yes.

11 Q. And Project Liberty targeted both Google and Apple; right?

12 A. That's correct.

13 Q. Isn't it true, though, that Samsung also charges
14 30 percent in general, their list price, on in-app purchases in
15 the Samsung Galaxy Store?

16 A. I'm not sure exactly what Samsung charges.

17 Q. Well, Epic distributes Fortnite through the Samsung
18 Galaxy Store; right?

19 A. That's correct.

20 Q. And so Epic's not paying the actual list price of the
21 Samsung Galaxy Store, is it?

22 A. What do you mean by "list price"?

23 Q. Epic's not paying Samsung Galaxy 30 percent for in-app
24 purchases on Fortnite made through the Samsung Galaxy Store, is
25 it?

1 A. No, we do not.

2 Q. And this coalition that you and your PR team created, it
3 never targeted Samsung, did it?

4 A. The principles apply to all platform holders.

5 MS. BELL: Your Honor --

6 BY MS. BELL:

7 Q. Well, the coalition has spoken out against Apple and
8 Google; right.

9 A. I believe so, yes.

10 Q. But not against Samsung, has it?

11 A. I'm not sure.

12 Q. So putting the coalition aside, Project Liberty itself
13 never targeted Samsung; right?

14 A. No.

15 Q. And you, yourself, don't believe that Samsung actually
16 abides by the principles for app fairness that are on your
17 coalition's website, do you?

18 A. I'm sure there's things that we would want Samsung to
19 improve as well.

20 Q. You, yourself, do not believe that Samsung abides by the
21 principles for app fairness that are on the coalition's
22 website, do you, Mr. Weissinger?

23 A. I agree with your statement.

24 Q. But unlike with Google and Apple, Epic accepted a special
25 lower deal from Samsung in which Epic paid Samsung a lower

WEISSINGER - CROSS / MOSKOWITZ

1 service fee; right?

2 **A.** Yes, we had a different rate.

3 **Q.** And so with that special deal that Epic has, it chose not
4 to focus Project Liberty on Samsung; right?

5 **A.** I'm not sure if all of that connects together.

6 **Q.** Epic has a special deal with Samsung Galaxy; correct?

7 **A.** Yes.

8 **Q.** And Epic chose not to target Project Liberty at the
9 Samsung Galaxy Store; right?

10 **A.** Epic chose not to target for the Samsung Galaxy Store?
11 Would you mind repeating that?

12 **Q.** Epic chose to not focus Project Liberty on Samsung;
13 correct?

14 **A.** That's correct.

15 **Q.** Thank you.

16 **MS. BELL:** I pass the witness.

17 **THE COURT:** Okay.

18 **MS. MOSKOWITZ:** May I proceed, Your Honor?

19 **THE COURT:** Yes.

20 **MS. MOSKOWITZ:** Thank you.

21 **CROSS-EXAMINATION**

22 **BY MS. MOSKOWITZ:**

23 **Q.** Good afternoon, Mr. Weissinger.

24 **A.** Good afternoon.

25 **Q.** I'm going to try to go very quickly, so bear with me.

1 Do you remember you were shown a chart? Maybe we can pull
2 it up. It's page 38 of Exhibit 10521. It was that chart --

3 **MS. MOSKOWITZ:** Oh, can we please have the screen,
4 Ms. Clark?

5 **BY MS. MOSKOWITZ:**

6 **Q.** This was that chart about a bunch of percentages. Do you
7 remember seeing that? It's on the screen now.

8 **A.** Yes.

9 **Q.** You were asked a bunch of questions about whether the
10 percentages in here reflected the number of players that spent
11 money in these platforms, and you said no. Do you remember
12 that?

13 **A.** I do.

14 **Q.** And you were shown some testimony that said something
15 different. Do you remember that?

16 **A.** Correct.

17 **Q.** Can you just explain what's going on here and what the
18 misunderstanding was?

19 **A.** Sure. On the column on the left, you see "First Seen
20 Players," basically what platform a player was first seen on.
21 So PlayStation or Xbox or Switch. And then you see "Platform
22 Purchase." This is the percentage of overall purchases that
23 are made on each of those platforms, not the percentage of
24 players on each platform.

25 **Q.** All right. And you were shown page 17.

1 Let's go there, please.

2 This was that funnel page. Do you remember that?

3 A. I do.

4 Q. You were asked some questions about the 37 percent
5 drop-off?

6 A. Correct.

7 Q. And you were asked about other reasons why that drop-off
8 might have been experienced?

9 A. Yes.

10 Q. And I think you were shown a page talking about the size
11 of Fortnite right after that. Do you remember that?

12 A. I do.

13 Q. What's being -- just a couple questions.

14 What was being downloaded at this step? Was it Fortnite
15 or was it something else?

16 A. It was the Epic Games app.

17 Q. Was the Epic Games app the same size as Fortnite?

18 A. No, it was not.

19 Q. Were there size restrictions associated with the
20 Epic Games app?

21 A. It was a very different size versus the Fortnite app.

22 Q. In your understanding, is any of that 30 percent drop-off
23 associated with a min spec or a size issue with a download?

24 A. No, it was not.

25 Q. Then you were asked about this 40 percent drop-off at the

1 next stage. Do you remember that?

2 **A.** I do.

3 **Q.** You were asked whether the number 40 is greater than 37.

4 Do you remember that?

5 **A.** I do.

6 **Q.** I think you wanted to clarify that that's not what's going
7 on here. Can you explain what the -- what's going on at the
8 40 percent versus the 37 percent?

9 **A.** Sure. This is a funnel that represents the number of
10 players who are dropping off at each step of an installation
11 process. And so at this first step when people are trying to
12 download the Epic Games app, they're greeted with a warning on
13 Android, and it causes 37 percent of everyone who's starting
14 this process to drop off and abandon the installation process.

15 After that, there is a min spec check that then there's an
16 additional 40 percent that occurs, but it's 40 percent after
17 the 37 percent.

18 **Q.** And you were asked a bunch of questions about PR strategy
19 and all of that. Do you remember those questions and answers?

20 **A.** I do.

21 **Q.** I think the implication was that you up ginned up some
22 issues to hide that you were complaining about the 30 percent
23 taxes; is that right?

24 **A.** No, definitely not.

25 **Q.** What were the other issues? I guess let's start there.

1 What were the other issues that Epic was bringing to bear
2 through Project Liberty in this case?

3 **A.** Sure. Unfair app policies as it relates to pricing and
4 use of payment systems.

5 **Q.** And were there any other issues in terms of app
6 distribution?

7 **A.** And the fact that there's no other way to distribute your
8 app outside of Play in an effective manner.

9 **Q.** Were those issues raised for the first time in connection
10 with Project Liberty in 2020?

11 **A.** No.

12 **Q.** Going back to when did those issues become front of mind
13 for Epic?

14 **A.** They had for a long time.

15 **Q.** You were asked about Samsung. Do you remember that?

16 **A.** I do.

17 **Q.** And you were asked or told that you weren't challenging
18 Samsung through Project Liberty. Do you remember that?

19 **A.** I do.

20 **Q.** Is there anything different about Samsung compared to
21 Google that makes it different in your mind?

22 **A.** Yeah. Samsung are exceptional promotional partners who
23 really go above and beyond in order to help support the
24 products and the software that's on their platforms.

25 **Q.** Does Samsung have the same reach and control and power as

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1 Google?

2 **A.** No, they do not.

3 **MS. MOSKOWITZ:** Pass the witness.

4 **THE COURT:** Okay. Very brief redirect.

5 **MS. BELL:** Yes, Your Honor. Thank you.

6 If we could have control of the screen and look at
7 Exhibit 10521 again, please, and go to Slide 24.

8 **REDIRECT EXAMINATION**

9 **BY MS. BELL:**

10 **Q.** Sir, there's no Epic Games app required on the iPhone;
11 correct?

12 **A.** No, there's not.

13 **Q.** And if we look at the Footnote 1 of the slide, you see
14 that we're talking about fresh installs on iPhone X? Do you
15 see that?

16 **A.** I do see that.

17 **Q.** And so if we look back at the chart as a whole, across the
18 top you have Fortnite compared to PUBG compared to Call of
19 Duty: Mobile; right?

20 **A.** Correct.

21 **Q.** And if you look at the fourth row, it says "First
22 Load/Patch Time"; right?

23 **A.** Yes.

24 **Q.** You see Fortnite has a first load of 14 minutes and
25 24 seconds? Do you see that?

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1 **A.** I do see that.

2 **Q.** You see PUBG has 6 seconds and Call of Duty has
3 33 seconds; right?

4 **A.** I do see that.

5 **MS. BELL:** Thank you. No more questions.

6 **THE COURT:** Okay. Our next witness, please.
7 You can step down.

8 (Witness excused.)

9 **MR. MACH:** Google calls Andrew Grant of Epic Games,
10 Your Honor.

11 **THE COURT:** Okay.

12 **THE CLERK:** Can you please raise your right hand?

13 **ANDREW JAMES GRANT,**
14 called as a witness for the Defendant, having been duly sworn,
15 testified as follows:

16 **THE WITNESS:** I do.

17 **THE CLERK:** Thank you. Please be seated.

18 Please state your full name for the Court and spell your
19 last name.

20 **THE WITNESS:** My name is Andrew James Grant, and
21 that's spelled G-R-A-N-T.

22 **THE CLERK:** Thank you.

23 **MR. MACH:** Thank you, Your Honor.

24 \\

25 \\

GRANT - DIRECT / MACH

DIRECT EXAMINATION

BY MR. MACH:

Q. Good afternoon, Mr. Grant.

A. Hi.

Q. You work at Epic Games; right, sir?

A. Yes, I do.

Q. And you are an engineering fellow for Epic; is that fair?

A. No, it's not.

Q. What's your title today, sir?

A. My title is senior director of engineering.

Q. Is that a new title since your deposition?

A. Yes, it is.

Q. Congratulations, sir.

You've overseen projects related to Fortnite; right?

A. Yes.

Q. And you worked on Project Liberty; right, sir?

A. Yes.

Q. And the release of Project Liberty, that was the release of the Hotfix; right, sir?

A. Yes.

Q. And you understand that Epic had a contract with Google; right, sir?

A. Yes.

Q. And you knew that Project Liberty violated Epic's contract with Google; right, sir?

GRANT - DIRECT / MACH

1 **A.** Yes.

2 **Q.** Could you please turn with me to the tab that's marked
3 10010 in the binder?

4 **A.** Okay.

5 **Q.** And do you recognize what's been marked as Exhibit 10010
6 as a Slack thread between you and a colleague at Epic Games
7 named Trevor Stone, sir?

8 **A.** Yes.

9 **MR. MACH:** Your Honor, I'd like to offer Exhibit 10010
10 into evidence.

11 **MR. BYARS:** No objection, Your Honor.

12 **THE COURT:** It's admitted.

13 (Trial Exhibit 10010 received in evidence.)

14 **BY MR. MACH:**

15 **Q.** Now, Exhibit 10010 is dated July 29th, 2020; right, sir?

16 **A.** Yes, it is.

17 **Q.** And that was just a little bit less than a month before
18 Epic released the Hotfix that we've talked about; right?

19 **A.** A few weeks before, yes.

20 **Q.** And when you released the Hotfix, you were trying to
21 thread a needle where you violated only certain agreements with
22 Google but not others that you were okay with; correct?

23 **A.** In this conversation, that was the aim, yes.

24 **Q.** About a third of the way down the page you told your
25 colleague, quote (as read):

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1 "The needle we're trying to thread is not fall foul
2 of any agreements we have with Google other than as needed
3 for Project Liberty."

4 Right, sir?

5 **A.** Specific to this topic we were discussing, yes.

6 **Q.** And that's because you understood that releasing the
7 Hotfix would breach your contract with Google; correct?

8 **A.** Yes, we did.

9 **Q.** Let me shift gears a bit and ask you about some
10 alternatives to the Google Play Store. Okay?

11 **A.** Sure.

12 **Q.** Now just to set the table a little bit, when Fortnite was
13 first launched on Android, it wasn't on Google Play; right?

14 **A.** That's correct.

15 **Q.** Instead, it was distributed through Samsung's app store
16 and through sideloading; correct?

17 **A.** Through a website, yes.

18 **Q.** When you say through your website, that's where a user
19 could go to sideload the app; correct?

20 **A.** That is where they would download the app to then sideload
21 it, yes.

22 **Q.** I apologize, sir. I just didn't hear you.

23 **A.** You would go to the website to download the app, and then
24 would be able to sideload it, yes.

25 **Q.** Understood. Thank you, sir.

GRANT - DIRECT / MACH

1 Now, when Epic launched on Android outside of Google Play,
2 Google actually helped Epic achieve that, didn't it, sir?

3 **A.** They helped the development of Fortnite for Android, yes.

4 **Q.** They helped the development of Fortnite when you intended
5 to launch Fortnite not on Google Play but through Samsung
6 Galaxy and sideloading; correct, sir?

7 **A.** Yes.

8 **Q.** Let's turn to the tab marked 10004, if you would, sir.

9 **A.** Okay.

10 **Q.** And you've seen what's marked as Exhibit 10004 before;
11 correct, sir?

12 **A.** Yes, I have.

13 **Q.** And this was a blog post that was posted to Epic's
14 website; correct, sir?

15 **A.** Yes.

16 **Q.** And the author of this document was the Fortnite team;
17 right?

18 **A.** I believe it was one or two people on the Fortnite team
19 but, yes.

20 **Q.** And you were a member of that team; right, sir?

21 **A.** Yes, I was.

22 **MR. MACH:** Your Honor, I'd like to offer into evidence
23 Exhibit 10004, please.

24 **MR. BYARS:** No objection.

25 **THE COURT:** It's admitted.

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(Trial Exhibit 10004 received in evidence.)

BY MR. MACH:

Q. And this blog post is dated September 6th, 2018. Do you see that?

A. Yes.

Q. And were discussing the launch of Fortnite on Android without Google Play here; right?

A. Yes.

Q. Let's go to page 2, please, Phil.

Now, when Epic launched on Android without Google Play, Epic told the public that working with partners was crucial to bringing Fortnite to Android; right?

A. Yes.

Q. And one of the partners that was crucial in getting Fortnite on Android without Google Play was Google itself that helped you with that; right?

A. I don't know if I would describe those as crucial, but they were very helpful.

Q. Well, the blog post does discuss Google under this sentence; right, sir?

A. They're one of the partners, yes.

Q. It actually -- if we could go lower down in the paragraph, Phil, there's a new -- I'm sorry. There's a new paragraph. There you go.

It explains after that sentence that (as read):

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1 "Google engineers also visited us on-site to profile
2 and optimize Fortnite, helping us to identify key
3 optimizations, a memory leak, and also to work out a solid
4 frame-pacing implementation for open GL on Android."

5 Do you see that, sir?

6 **A.** I do, yes.

7 **Q.** That's true; correct, sir?

8 **A.** Yes.

9 **Q.** And it went on to explain to the public that the Android
10 engineers were very talented and passionate about making the
11 Android ecosystem awesome for gaming and constantly improving
12 it? Do you see that, sir?

13 **A.** I do.

14 **Q.** And that included Fortnite I assume; right?

15 **A.** Yes.

16 **Q.** Now, you know that when Epic distributed its game this
17 way, Google didn't get paid anything for the use of the Android
18 platform; right?

19 **A.** I don't know if I believe that's correct.

20 **Q.** Well, it didn't get paid anything through the Play Store
21 for Play Store commissions, that kind of thing; right, sir?

22 **A.** No, but it's running on Android devices that Google sell.

23 **Q.** Right. So when Epic launched Fortnite on Android but
24 outside of Google Play, you thought that was a win-win; right?

25 **A.** I don't believe I ever thought about that, no.

GRANT - DIRECT / MACH

1 **Q.** Well, when Epic launched Fortnite on Android outside of
2 Google Play, that would have -- and Epic -- I'm sorry -- and
3 Google supported that, their contributions would have made for
4 better performance of games on the Android platform?

5 **A.** Yes.

6 **Q.** And that would have been a win for Google because if games
7 didn't work well on Android and there was some kind of
8 performance disparity, that would have resulted in a loss from
9 Android to other platforms; right, sir?

10 **A.** I don't know.

11 **MR. MACH:** Your Honor, if we could, let's go to Tab 1,
12 which is confusingly in the back, page 93.

13 **THE COURT:** Line?

14 **MR. MACH:** Starting on line 23 and then proceeding to
15 the next page, line 10.

16 **THE COURT:** Line 93? Oh, sorry.

17 **MR. MACH:** Page 93.

18 (Pause in proceedings.)

19 **THE COURT:** Yes, that's fine.

20 **MR. MACH:** Thank you, Your Honor.

21 Phil, let's publish that.

22 **BY MR. MACH:**

23 **Q.** And in your deposition, Mr. Grant, you were asked this
24 question (as read):

25 "To your knowledge did Epic compensate Google for any

GRANT - DIRECT / MACH

1 of these services?"

2 Do you see that, sir?

3 **A.** I do.

4 **Q.** And the answer you gave was (as read):

5 "I would have to ask what form of compensation. I
6 mean, all of these changes would have gone into Unreal
7 Engine. They would have resulted in better performance
8 for games that use Unreal Engine on Android. So those
9 titles would work better and the performance -- any
10 performance disparity would be decreased to other
11 platforms. So I think it was a win-win to compensation."

12 Do you see that, sir?

13 **A.** I do.

14 **Q.** So you do, in fact, believe that it was a win-win for Epic
15 and Google when Fortnite was launched on Android outside of
16 Google Play; right, sir?

17 **A.** In this context, yes.

18 **Q.** And in this context you thought it was a win-win because,
19 as you said in your deposition, if Google hadn't contributed to
20 good performance of Fortnite on Android, it would have resulted
21 in a loss to other platforms; right, sir?

22 **A.** I don't recall if I said that, no.

23 **Q.** You don't recall if you said that, sir?

24 **A.** No.

25 **MR. MACH:** Your Honor, with permission, I'll put the

GRANT - DIRECT / MACH

1 same clip back up.

2 **THE COURT:** That's fine.

3 **BY MR. MACH:**

4 **Q.** So your testimony starting on line 5, sir, was (as read):

5 "They would have resulted in better performance for
6 games that use Unreal Engine on Android."

7 Do you see that?

8 **A.** I do.

9 **Q.** And you said (as read):

10 "Those titles would work better and any performance
11 disparity would be decreased to other platforms."

12 Do you see that?

13 **A.** I do.

14 **Q.** In other words, if a game works better on Android, it
15 might mean they get more users from other platforms; right?

16 That's what that means, isn't it?

17 **A.** I -- it could mean that, yes.

18 **Q.** It does mean that; right? That was your sworn testimony.

19 It does mean that, sir.

20 **A.** Not necessarily. I mean, Google -- users of Androids
21 would have a better experience and find the platform more
22 enjoyable if their performance was higher.

23 **Q.** Right, exactly, they might find the experience more
24 enjoyable. And if they find the experience more enjoyable, in
25 your words, "any performance disparity would mean a decrease

GRANT - DIRECT / MACH

1 for other platforms." That's your testimony, isn't it, sir?

2 **A.** Here I'm saying a performance disparity would be decreased
3 to other platforms, not there's a decrease in users.

4 **Q.** And when you refer to "other platforms," you're talking
5 about platforms like iOS, like consoles; right?

6 **A.** Game consoles, PCs, other mobile platforms, yes.

7 **Q.** Exactly. The performance of Fortnite on Android impacts
8 the degree to which those other platforms succeed or fail;
9 right?

10 **A.** I don't know if I would agree with that, no.

11 **Q.** Now, the document also discusses exactly how well Fortnite
12 was performing on Android when the blog post was released;
13 right?

14 **A.** This document or the blog post?

15 **Q.** I apologize. I think this document is the blog post.

16 Not the deposition, sir, but back to 10004. Sorry to
17 confuse.

18 **A.** Okay.

19 **Q.** You're back with me? Sorry.

20 **A.** I'm back, yes.

21 **Q.** Now this document, Exhibit 10004, also discusses how
22 Fortnite was performing when it launched outside of the
23 Play Store in 2018; correct?

24 **A.** I would have to read if you could point me to that
25 section.

GRANT - DIRECT / MACH

1 Q. All right. If we could just turn to the top of page 2.

2 A. Okay. I see the top of page 2 where we're talking about
3 the number of players who have experienced the game on Android.

4 Q. Right. And what Epic told the public at this time when it
5 was launching outside of Play was (as read):

6 "In the first 21 days since the Fortnite's launch on
7 Android, interest has been extremely high with over
8 23 million players entering our Android beta and over
9 15 million players installing our APK."

10 Do you see that, sir?

11 A. I see that, yes.

12 Q. And "installing our APK," that's a reference to 15 million
13 players sideloading it in that 21-day period; correct, sir?

14 A. No. This would also include Samsung users who would not
15 have sideloaded the app to be able to play.

16 Q. There's two figures here; right? 23 million and
17 15 million. Do you see that?

18 A. I do, yes.

19 Q. And do you understand the 23 million referring to overall
20 Samsung and sideloading?

21 A. No. I believe the 23 million is the number of peoples who
22 apply to join the Android beta. So they would submit their
23 address or account on our website, and then we would over time
24 release access to the beta to those people. So I believe
25 23 million people applied and 15 million people have accepted

GRANT - DIRECT / MACH

1 that invitation.

2 Q. Thank you for the clarification.

3 So between Samsung Galaxy and sideloading, combined at
4 this point in 21 days, 15 million people began installing
5 Fortnite; is that fair?

6 A. According to this document, yes.

7 Q. Now, at this time Fortnite was already available on iOS;
8 right?

9 A. Yes.

10 Q. And on iOS it was available through Apple's app store;
11 correct?

12 A. Yes.

13 Q. And as you told the public here, although you were only in
14 an invite-only phase for Fortnite on Android and you weren't in
15 the Google Play Store, the conversion you were experiencing was
16 already similar to what was happening on the iOS beta;
17 correct, sir?

18 A. Yes.

19 Q. The bottom line is: When you tried to launch without
20 Google Play, there was rapid adoption of Fortnite on Android;
21 right?

22 A. Certainly by the most eager Fortnite players, yes.

23 Q. I apologize. I just didn't hear you, sir.

24 A. Yes, we saw rapid adoption.

25 Q. And you found that launching your product outside of

GRANT - DIRECT / MACH

1 Google Play would sound and could be very successful, didn't
2 you, sir?

3 **A.** Can you ask that again?

4 **Q.** Yeah.

5 You found launching Fortnite outside of Google Play was
6 sound and could be very successful; correct?

7 **A.** I think we were pleased with the numbers, but this was the
8 early days of, you know, very keen Fortnite players coming to
9 play the game that they've been waiting for for some time,
10 so...

11 **Q.** Let's go to the last page of the exhibit, please.

12 Actually, page number 8. Thank you, Phil.

13 Do you see where it says "Conclusion"?

14 **A.** Yes.

15 **Q.** And Epic told the public (as read):

16 "Fortnite for Android represents many industry
17 firsts."

18 Do you see that?

19 **A.** I do.

20 **Q.** And then a little further down there's a sentence that
21 starts with "It was an immense undertaking and learning
22 process." Do you see that?

23 **A.** Yes.

24 **Q.** It says (as read):

25 "It was an immense undertaking and learning process,

GRANT - DIRECT / MACH

1 but the rapid adoption of over 15 million Android users
2 shows that this approach is sound and can be very
3 successful."

4 Correct, sir?

5 **A.** Yes.

6 **Q.** Now, before we move on, I want to touch on one other
7 aspect of this blog post, and that starts at the bottom of
8 page 7, the previous page.

9 **A.** Okay.

10 **Q.** Epic warned its users in the blog post about the battle
11 against malware. Do you see that?

12 **A.** Yes.

13 **Q.** And what Epic told the public was, quote (as read):

14 "Even before we announced that Fortnite would be
15 released on Android, we became aware of unauthorized
16 Fortnite for Android websites appearing. These typically
17 host malware or scams."

18 Do you see that, sir?

19 **A.** I do.

20 **Q.** And basically these were websites that were distributing
21 Fortnite, and they could have been distributing legitimate
22 Fortnite versions, could have been illegitimate Fortnite
23 versions? You didn't know; right?

24 **A.** I didn't know. I don't know what the people who authored
25 the article knew what these websites purported to offer.

GRANT - DIRECT / MACH

1 **MR. MACH:** Your Honor, if we could, Tab 1, page 95.

2 **THE COURT:** 95.

3 **MR. MACH:** Lines 13 to 25, Your Honor.

4 (Pause in proceedings.)

5 **THE COURT:** That's fine.

6 **MR. MACH:** Thank you, Your Honor.

7 **BY MR. MACH:**

8 **Q.** Let me see if I can just refresh your recollection, sir.

9 If you look -- this is your depo. You were asked (as
10 read):

11 "So these websites were advertising Fortnite for
12 Android; correct?"

13 And you said (as read):

14 "They were using the words 'Fortnite for Android.'"
15 And you were asked (as read):

16 "But they were not actually offering the authorized
17 version of Fortnite; right?"

18 And you said (as read):

19 "That's -- I don't know if -- this is a tricky one.
20 There is a nuance there. Clearly they were not authorized
21 to offer Fortnite for Android. Whether they were offering
22 the legitimate version of Fortnite for Android, I don't
23 know."

24 Do you see that, sir?

25 **A.** I do, yes.

GRANT - DIRECT / MACH

1 Q. So I just want to focus on that last bit for a moment, and
2 that is that you didn't know if the versions that were being
3 downloaded from the unauthorized sites were legitimate or
4 illegitimate; right?

5 A. I don't even know if they were offering any version of
6 Fortnite for download.

7 Q. Well, what Epic did was Epic implemented a warning for its
8 customers about the risk of sideloading from these sites;
9 right?

10 A. Could you help me out there?

11 Q. Yeah, sure.

12 Phil, if you wouldn't mind putting up the last paragraph
13 on that page.

14 A. Back to the tab?

15 Q. Yes, sir. It's Exhibit 10004 and it's page 7.

16 A. Okay. I got it.

17 Q. And in that last paragraph, Epic told the public (as
18 read):

19 "We continue to police the situation with a goal of
20 taking them offline or restricting access by leveraging
21 Epic's connection to a network of antifraud partners" --
22 then there's a parenthetical -- "who can implement an
23 in-browser alert like the following..."

24 Do you see that, sir?

25 A. I do, yes.

GRANT - DIRECT / MACH

1 Q. And the warning that Epic asked to be, asked to be
2 implemented about the sideloading process is on the next page.
3 Do you see that, sir?

4 A. This is not about the sideloading process, no.

5 Q. Well, it's about the risk that the user might get the
6 source -- get the app from a source that Epic didn't know; is
7 that fair?

8 A. Well, I think any interaction with a website that is
9 pretending to be Epic but is not Epic is what we're concerned
10 about.

11 Q. Right. Even though Epic wasn't sure whether the content
12 was legitimate or illegitimate, it knew the safe thing was to
13 warn users and let them determine what to do; is that fair?

14 A. Yes. Informing users is generally a good thing, yes.

15 Q. You knew that the kinds of alerts that you asked to be put
16 in the browser could be helpful to informing the user that
17 they're visiting a website that could be pretending to be
18 something else; right?

19 A. Yes.

20 Q. Now, let's turn back to the details of sideloading for a
21 minute and the burdens of it.

22 I think you said, when we looked at the blog post, that in
23 those early days it looked pretty good; right?

24 A. The -- yes. The blog post says that, yes.

25 Q. If you could please look at Exhibit 10005 in your binder,

GRANT - DIRECT / MACH

1 sir.

2 A. Okay.

3 Q. And you recognize Exhibit 10005 as an e-mail exchange
4 between someone named Justin Sargent, your colleague at
5 Epic Games, and you, among others; right, sir?

6 A. Yes, I do.

7 MR. MACH: Your Honor, at this time I'd like to offer
8 Exhibit 10005 into evidence.

9 MR. BYARS: No objection.

10 THE COURT: It's admitted.

11 (Trial Exhibit 10005 received in evidence.)

12 BY MR. MACH:

13 Q. Now, the e-mail at the top of this is from Mr. Sargent.
14 Do you see that?

15 A. Yes, I do.

16 Q. And Mr. Sargent was Epic's engineering lead for Epic's
17 store platforms; right.

18 A. I believe that's correct. I don't recall his exact
19 responsibilities.

20 Q. Your best recollection is that he was engineering lead on
21 Epic's store platforms; correct, sir?

22 A. At least one of the leads, yes.

23 Q. And at the top of the e-mail here, Mr. Sargent told you
24 that Amazon, because of the popularity of its other apps, it
25 had a way to smooth out the sideloading process. Do you see

GRANT - DIRECT / MACH

1 that?

2 A. Yes.

3 Q. And then at the bottom of his e-mail, Mr. Sargent told you
4 that the sideloading process that Epic used was already good,
5 didn't he?

6 A. I'm actually not sure what he's referring to here. I see
7 he's saying the new phone sideloading experience can be
8 improved -- I'm not sure can be improved much more, but I'm not
9 actually aware of what process he's talking about here.

10 Q. Well, what Mr. Sargent said is (as read):

11 "We're also pursuing other apps that could be
12 distributed in the Play Store that could do similar
13 things."

14 Do you see that, sir?

15 A. I do, yes.

16 Q. And you understand he's saying "Maybe we could do some of
17 the things that Amazon is doing that makes sideloading a little
18 easier for them"? You understand that; right?

19 A. I think the Amazon situation is specific to very old
20 Android phones; but, yes, he's suggesting we do the same thing.

21 Q. And he said (as read):

22 "Although, frankly, I'm not sure the new phone
23 sideloading experience can be improved much more, it's
24 actually pretty good."

25 Right, sir?

GRANT - DIRECT / MACH

1 A. This is what he says, yes.

2 Q. Let's shift gears a little bit. I want to ask you some
3 questions about how a user might be able to access Fortnite
4 using a streaming service. Okay?

5 A. Sure.

6 Q. Now let's start with you, sir. You play Fortnite; right?

7 A. I do.

8 Q. And the primary way that you play Fortnite for your own
9 personal entertainment is not from an app store or sideloading
10 it, but by using a streaming service; correct, sir?

11 A. These days, yes.

12 Q. And you use both GeForce Now streaming service and the
13 XCloud streaming service; right?

14 A. Mostly GeForce Now but, yes.

15 Q. At some point you used both. You've shifted a little to
16 GeForce Now predominantly; is that fair?

17 A. I used myself Cloud gaming while we developing that
18 service, but mostly now GeForce Now.

19 Q. By using a streaming service like GeForce Now, you can
20 access Fortnite on a mobile device without ever downloading the
21 Fortnite app; right?

22 A. In some situations.

23 Q. And you can then play Fortnite on Android using
24 GeForce Now?

25 A. Again, with some limitations and in certain conditions,

GRANT - DIRECT / MACH

1 yes.

2 Q. And someone playing Fortnite on a streaming service as
3 part of that session, they can make an in-app purchase; right?

4 A. Yes.

5 Q. And when a player plays Fortnite on an Android device in
6 that way and they make an in-app purchase, Google doesn't get
7 anything from that transaction; correct?

8 A. No.

9 Q. The bottom line is it's a way that at least, as you said,
10 a subset of users on Android can access Fortnite without going
11 through the Play Store or similar; correct?

12 A. A subset, yes.

13 Q. And as I think you mentioned in your deposition, the way
14 that it works is you basically pull out your phone at your
15 kitchen table, or you're at your in-laws or whatever, and use
16 an Internet connection to play Fortnite on your handheld;
17 right?

18 A. When you say "you," are you talking about me or the
19 general "you?"

20 Q. I'm just using you as an example.

21 A. Yes. Using an iPad but, yes, I'll do it, I'll play at
22 my kitchen table.

23 Q. You could do it on an iPad, you could do it on a phone;
24 right?

25 A. I could if I wanted, yes.

GRANT - DIRECT / MACH

1 Q. Now, you do need an Internet connection to use a streaming
2 service; right?

3 A. Yes, a good one.

4 Q. Now, you said "a good one." We'll come back to that in a
5 minute.

6 Now, the native Fortnite app that you get through an app,
7 not a streaming service, you also have to have an Internet
8 connection to play; right?

9 A. Yes.

10 Q. Now, I don't want to get into your personal life, but I'm
11 assuming that your in-laws, for example, which we talked about
12 a minute ago, they don't have some kind of extraordinary
13 Internet connection the rest of us can't have, do they, sir?

14 A. No, they do. I'm a good son-in-law so, yes, they do.

15 Q. They don't have the kind of Internet connection that any
16 of us in this room would not be able to get, do they, sir?

17 A. I don't know.

18 Q. You don't have any reason to think so?

19 A. I don't live in the Bay Area. I'm not sure -- I'm not
20 aware what connections are here.

21 Q. I think we've done enough on that, sir. We can move on.

22 Now, Mr. Sweeney, you've discussed streaming services with
23 him; right, sir?

24 A. Yes.

25 Q. And Mr. Sweeney has told you that he thinks that the

GRANT - DIRECT / MACH

1 developments with streaming services like Xbox Cloud are a
2 massive opportunity for the company; right?

3 **A.** I think he identified Xbox Cloud gaming as a massive
4 opportunity for us to pursue, yes.

5 **Q.** If we could just turn quickly to Exhibit 10538 in your
6 binder, sir.

7 And do you recognize Exhibit 10538 as an e-mail exchange
8 between you, Mr. Sweeney, and others at Epic?

9 **A.** Yes, I do.

10 **MR. MACH:** Now I'd like to offer Exhibit 10538 into
11 evidence, Your Honor?

12 **MR. BYARS:** No objection.

13 **THE COURT:** It's admitted.

14 (Trial Exhibit 10538 received in evidence.)

15 **BY MR. MACH:**

16 **Q.** Now if you could turn to the very last e-mail in the
17 thread, there's an e-mail from Mr. Sweeney; right?

18 **A.** The first e-mail in the thread.

19 **Q.** Yes. The last physically in order, the first
20 chronologically, that's correct.

21 **A.** Okay.

22 **Q.** And you see in this e-mail and in all caps Mr. Sweeney
23 discussing Xbox Cloud streaming, explained it was one massive
24 opportunity; correct?

25 **A.** Yes, I see that.

GRANT - DIRECT / MACH

1 **Q.** And if you go a little further up in the thread to your
2 e-mail of 8:55 p.m. on October 5th.

3 **A.** Okay.

4 **Q.** You had discussed the opportunity with Microsoft; right?

5 **A.** I did, yes.

6 **Q.** And you reported to Epic's CEO that they have everything
7 you needed to deliver a great touch experience on XCloud
8 streaming in a sustainable way; right?

9 **A.** Yes. Their technology was great.

10 **Q.** And then you did, in fact, launch Fortnite on the XCloud
11 service; right?

12 **A.** Sometime after this but, yes, we did.

13 **Q.** Let's take a look at that. If you could turn to the
14 document 10540, sir.

15 Exhibit 10540 is an e-mail exchange between you and a
16 number of listservs at Epic Games; correct, sir?

17 **A.** It is an e-mail I sent to listservs but, yes.

18 **Q.** Thank you, sir.

19 **MR. MACH:** Your Honor, I'd like to offer Exhibit 10540
20 into evidence.

21 **MR. BYARS:** No objection.

22 **THE COURT:** Admitted.

23 (Trial Exhibit 10540 received in evidence.)

24 **BY MR. MACH:**

25 **Q.** Now, this e-mail would have gone to a large number of

GRANT - DIRECT / MACH

1 users at Epic, including Mr. Sweeney; correct, sir?

2 **A.** Yes.

3 **Q.** And this is where you announced the launch of Fortnite on
4 XCloud; correct?

5 **A.** Yes.

6 **Q.** And that made Fortnite available to play for free via
7 XCloud gaming on iOS, iPad, Android, Windows, and Mac;
8 correct?

9 **A.** Yes.

10 **Q.** And you told -- we'll find it in the e-mail here -- you
11 told them in your e-mail that mobile players will use
12 Safari/Chrome and be able to use on-screen touch controls or a
13 blue tooth controller. Do you see that?

14 **A.** I do.

15 **Q.** And what this meant is that regardless of the hardware
16 that they had, players in 70 percent of Epic's markets would
17 have the option of playing Fortnite for free with no need to
18 install or patch the game; correct?

19 **A.** There's a little bit of hyperbole but, yes, that's what I
20 said.

21 **Q.** And if you look at the very bottom of the document, you
22 show two examples of how this service works; right? Two images
23 at the bottom?

24 **A.** Yes.

25 **Q.** And what you do is you show two images, both Android

GRANT - DIRECT / MACH

1 devices; right?

2 A. Yes.

3 Q. One of those is actually a Google Pixel phone; right?

4 A. Yes. A Pixel 3 phone, yes.

5 Q. And what these images are showing are Android devices
6 successfully running Fortnite with no connection to the Google
7 Play Store but using a streaming service instead; right?

8 A. Yes.

9 Q. And you announced to your team at the very bottom of the
10 e-mail near the pictures (as read):

11 "We are now at the point where anything with a web
12 browser can run Fortnite."

13 Right, sir?

14 A. Yes.

15 Q. Now, it's true, isn't it, that Epic hasn't really done
16 everything it could do to promote Fortnite's success on
17 streaming services like GeForce Now?

18 A. I don't know if I would say that, no.

19 Q. Let me be more specific. Epic doesn't actually know how
20 much demand there is to stream games like Fortnite on
21 GeForce Now to things like Android devices; right?

22 A. It's certainly difficult to know.

23 Q. You don't know.

24 You said it's difficult to know, but the reason you don't
25 know is because Epic actually hasn't devoted any resources to

GRANT - DIRECT / MACH

1 studying whether there's demand to access games like Fortnite
2 on the Android platform using GeForce Now?

3 **MR. BYARS:** Objection. Foundation.

4 **THE COURT:** Go ahead. Just keep it short. Yeah, go
5 ahead.

6 **THE WITNESS:** I'm not sure what you mean by
7 "studying." We look at analytics. We look at data. We
8 haven't run any studies.

9 **MR. MACH:** Your Honor, if I could, Tab 2, page 64.

10 **THE COURT:** Line?

11 **MR. MACH:** 9 to 15.

12 (Pause in proceedings.)

13 **THE COURT:** Okay.

14 **MR. MACH:** Phil, if we could put that up, please.

15 **BY MR. MACH:**

16 **Q.** You were asked in your deposition the same question I
17 asked here, sir (as read):

18 "So you have not devoted resources to studying
19 whether there is demand to access games like Fortnite on
20 the Android platform using GeForce Now?"

21 Do you see that?

22 **A.** I do.

23 **Q.** And your answer was (as read):

24 "Not to my knowledge, no."

25 That's true?

GRANT - DIRECT / MACH

1 **A.** Yes, not to my knowledge is true.

2 **Q.** Well, let's wrap this up with a few more general
3 questions.

4 The bottom line is, there are many ways to play Fortnite
5 on mobile devices; right?

6 **A.** I wouldn't say "many." There are several.

7 **Q.** You wouldn't say that.

8 And when it comes to Android specifically, you can
9 download Fortnite to your device or you can play using Cloud
10 gaming; right?

11 **A.** In certain circumstances -- apologies.

12 In certain circumstances, yes.

13 **Q.** And you can play Fortnite on Android through Cloud gaming,
14 no download required, just launch it and play; right?

15 **A.** Again, in certain circumstances, yes.

16 **Q.** And without using Google Play, you can download the app
17 from Epic Games, you can get it from the Samsung Galaxy Store,
18 you can play using Xbox Cloud gaming, GeForce Now, or Amazon
19 Luminet; right?

20 **A.** Samsung users can download it from the Samsung
21 Galaxy Store; and people who have GeForce Now membership can
22 play on GeForce Now or Xbox, which are both streaming services,
23 yes.

24 **Q.** And for those who choose to sideload the app today, it
25 takes four steps to do it; right?

GRANT - DIRECT / MACH

1 **A.** I don't believe that's correct.

2 **Q.** Okay. I want to show you where I got those statements,
3 sir. If we could turn to Exhibit 6621 in your binder.

4 **A.** Okay.

5 **Q.** You recognize Exhibit 6621 as a screenshot from Epic's
6 public-facing website; right, sir?

7 **A.** I do, yes.

8 **MR. MACH:** I'd like to offer Exhibit 6621 into
9 evidence, Your Honor.

10 **MR. BYARS:** No objection.

11 **THE COURT:** It's admitted.

12 (Trial Exhibit 6621 received in evidence.)

13 **BY MR. MACH:**

14 **Q.** Now, you could see that Epic tells the public it can play
15 Fortnite on mobile devices. Do you see that, sir?

16 **A.** I do, yes.

17 **Q.** And just like I just said to you, Epic tells the public
18 there are many ways to play Fortnite on mobile devices, doesn't
19 it, sir?

20 **A.** This is what the website says, yes.

21 **Q.** And it doesn't say that Fortnite is blocked on mobile; it
22 describes five different ways to do it. Do you see that, sir?

23 **A.** I think we described two ways, and one way has three
24 services.

25 **Q.** I see. So we have three different streaming services, we

GRANT - DIRECT / MACH

1 have direct downloading, AKA sideloading, and we have the
2 Samsung Galaxy Store; right?

3 **A.** Yes. You can stream or you can download the app, yes.

4 **Q.** Well, I clicked on Android on the website, and I want to
5 show you what I got.

6 If you turn to Exhibit 6618, I want to ask you about that.

7 **A.** (Witness examines document.)

8 **Q.** You recognize Exhibit 6618 as another screenshot from
9 Epic's public-facing website; right, sir?

10 **A.** Yes, I do.

11 **MR. MACH:** Your Honor, I'd like to offer Exhibit 6618
12 into evidence.

13 **MR. BYARS:** No objection.

14 **THE COURT:** It's admitted.

15 (Trial Exhibit 6618 received in evidence.)

16 **BY MR. MACH:**

17 **Q.** Now, Exhibit 6618, this shows Android users how to play
18 Fortnite on Android; right?

19 **A.** Give me a second.

20 (Witness examines document.) I don't know if I would say
21 it shows it. It lists options with an FAQ about details and
22 requirements.

23 **Q.** It does say in big bold letters the top "Play Fortnite on
24 Android": Right, sir?

25 **A.** Yes.

GRANT - DIRECT / MACH

1 **Q.** And then, again, it shows a couple of options. It says on
2 the left "Download the Epic Games app on your Android device"
3 and on the right "Play Fortnite on Android through Cloud
4 gaming"; right, sir?

5 **A.** Yeah. Those are the two options you have.

6 **Q.** So I clicked on download the Epic Games app on your
7 Android device, and I want to show you what I found.

8 If you could please turn with me to Exhibit 6619.

9 **A.** (Witness examines document.)

10 **Q.** Now, you don't know this but I know this, there's been
11 lots of talk about sideloading. I'm not going to belabor it.

12 But do you recognize 6619 as another image from Epic's
13 public-facing website?

14 **A.** Okay. I thought this was what you saw; but, yes, this is
15 our website.

16 **Q.** Okay.

17 **MR. MACH:** I'd like to offer Exhibit 6619 into
18 evidence, Your Honor.

19 **MR. BYARS:** No objection.

20 **THE COURT:** It's admitted.

21 (Trial Exhibit 6619 received in evidence.)

22 **BY MR. MACH:**

23 **Q.** And I'll give you a moment to flip through the pages of
24 Exhibit 6619, but let me ask you whether 6619 is the way that
25 Epic tells the public they download -- they sideload Fortnite

GRANT - CROSS / BYARS

1 onto a mobile phone?

2 **A.** This is a walk-through for users that explains a certain
3 part of the flow, but it's not the entire flow.

4 **Q.** So we'll come back to that in a moment.

5 Let's just talk through the steps. It does show just four
6 steps to complete the process; right, sir?

7 **A.** It shows four steps, but the process is not completed
8 after this, no.

9 **Q.** Well, it doesn't show any steps after four, does it, sir?

10 **A.** It does not show -- it shows four steps and then nothing
11 else, yes.

12 **MR. MACH:** No further questions. Thank you very much.

13 **THE COURT:** Okay. Let's take our afternoon break.
14 We'll be back at 2:15.

15 **THE CLERK:** All rise.

16 (Recess taken at 1:55 p.m.)

17 (Proceedings resumed at 2:14 p.m.)

18 (Proceedings were heard out of the presence of the jury:)

19 **THE COURT:** Okay. Bring the jury.

20 (Proceedings were heard in the presence of the jury:)

21 **THE COURT:** Okay.

22 **MR. BYARS:** May I proceed, Your Honor?

23 **THE COURT:** Yes.

24 **MR. BYARS:** Thank you.

25 \\\

GRANT - CROSS / BYARS

CROSS-EXAMINATION

BY MR. BYARS:

Q. Mr. Grant, I'll just have some brief questioning for you.

Google's counsel referred you to some testimony about a win-win. From your perspective, did Google benefit from efforts to develop Fortnite for the Android OS?

A. Yes.

Q. In what way did they obtain those benefits?

A. Fortnite was probably one of the most complex games that had been on the platform at that time, and so we were really stressing many other APIs and libraries and their device drivers very heavily, and I think they got a lot of information from that.

A lot of the learnings that we made and the things we discovered with their help would feed back into Unreal Engine, which is the in-house technology that we licensed to other developers and the other developers used to make games for the Android ecosystem. So those games run better as well. So it wasn't just Fortnite, but other Android games that were made with Unreal Engine would perform better as well.

Q. And you were asked some questions about the release of the beta version of Fortnite on Android.

In your experience, is it comparable -- is a beta user comparable in the level of interest to an another ordinary user of a game like Fortnite?

GRANT - CROSS / BYARS

1 **A.** No. Typically the beta users will be the most passionate
2 people out there literally waiting to get access.

3 **Q.** And I'd like to take you to that document, which was 10004
4 and ask you some questions about the other topic that Mr. Mach
5 asked you about.

6 **TECH PERSONNEL:** Ms. Clark, would you switch over,
7 please?

8 **MR. BYARS:** Apologies.
9 Thank you, Ms. Clark.

10 **BY MR. BYARS:**

11 **Q.** I'd like to show you page 7. There's a section that you
12 were asked about called "Battle Against Malware."

13 And I genuinely don't remember if they asked you about
14 this sentence in the second paragraph that says (as read):

15 "So far, Epic has instigated action on 47
16 unauthorized Fortnite for Android websites, many of which
17 appear to be run by the same bad actors."

18 Do you see that?

19 **A.** I do, yes.

20 **Q.** So is it consistent with your understanding that at the
21 time, Epic had actually identified 47 specific Fortnite for
22 Android websites that were unauthorized?

23 **A.** Yes.

24 **Q.** And Epic had further made a determination that many of
25 those appeared to be run by the same bad actors?

1 A. Yes.

2 Q. So then you were asked about the screen, the red sort of
3 caution screen on the next page.

4 Is it comparable to display such a warning screen with
5 respect to 47 identified unauthorized websites as it would be
6 to display such a screen for all websites across the Internet?

7 A. No, not at all.

8 Q. Why not?

9 A. I mean, these are sites that have been reported, have been
10 manually investigated, and have been flagged and are known to
11 cause harm. I'm not sure I could say the majority of them, but
12 there are certainly a lot of Internet sites out there that
13 don't cause harm and that users visit every day with no problem
14 whatsoever.

15 Q. And I'd like to show you now 10005. It's, I think, the
16 next tab in your binder.

17 And you were asked about Mr. Sargent's assessment here
18 with respect to the sideloading process. Do you recall them
19 asking questions about that?

20 A. I do.

21 Q. And did you agree or did you have an opportunity to assess
22 Mr. Sargent's understanding and assessment of that process?

23 A. I did. I had the opportunity to assess this, yes.

24 Q. What was your assessment of his assessment?

25 A. Unfortunately, he was incorrect.

1 Q. In what respects was he incorrect?

2 A. So when we looked at the flow of sideloading even on the
3 newer Android phones, it was very long. I believe we
4 identified it was -- I can't remember the number, but it was
5 more than 20 steps. Through some work, we actually were able
6 to reduce it further, but we still couldn't get it down to I
7 think it was around 15 steps in the end.

8 Q. And Mr. Sargent in the second paragraph here says (as
9 read):

10 "But we were seeing a 75 percent conversion of people
11 landing on our sideload website ultimately showing up in
12 the installer."

13 Did you make an assessment of that sentence as well?

14 A. Yes. I viewed the sentence with great skepticism the
15 second I read it.

16 Q. And why did you view that with skepticism?

17 A. That's an abnormally high conversion rate. My assumption
18 was that Justin was talking about like a certain part of the
19 flow program, perhaps the flow that his team owned but not the
20 end-to-end funnel, that we would call it, the user would go
21 through.

22 Q. I'd like to ask you some questions about the streaming
23 services.

24 And sorry to delve back into your family life, but you
25 were asked about the quality of your Internet connection. And

1 is there some particular element of the Internet connection
2 that is necessary to support a game like Fortnite using a
3 streaming service?

4 **A.** Yes. There's three -- there's three elements that are
5 important. So, first, it has to be fast and have low latency.
6 It has to have a high bandwidth, the amount of data that's
7 transferred. And then it has to be stable, and stable we
8 typically refer to as jitter, and that speaks to the stableness
9 of the Internet connection over a period of time.

10 **Q.** And if an Internet connection doesn't have those elements,
11 would that have an impact on the user's ability to play a game
12 like Fortnite?

13 **A.** Certainly a streaming game, yes.

14 **Q.** And what -- how would it impact that user's experience?

15 **A.** So with a streaming game you are typically streaming
16 graphics from a Cloud service, the user's device. Some people
17 think of it like Netflix, and that's not incorrect; but because
18 it's the game, the amount of interactivity and the latency,
19 latent responsiveness, is very, very important.

20 So something like Netflix can actually handle a poor
21 connection very well because it will buffer for a period of
22 time, it will wait a couple of seconds before starting and then
23 play out. But a game really has to deliver the images almost
24 instantly for it to feel like a good experience to the user,
25 and any disruption to that, any jitter, any blips in latency,

1 will result in the experience just being poor.

2 **Q.** And are there any other disadvantages with respect to a
3 user's perspective in terms of using a streaming service to
4 play Fortnite?

5 **A.** Yes.

6 **Q.** What are those disadvantages?

7 **A.** Aside from the Internet connection, you will typically
8 have to have an account or a membership with one of the
9 companies that offers a streaming service.

10 **Q.** And I think you were asked about whether that was free.
11 Is that always a free service?

12 **A.** Some of the companies do offer a free tier to users.
13 Those users are able to play at certain times of the day when
14 there is generally low usage; but at weekends, they'll be
15 subjected to a waiting queue.

16 **Q.** And do you have personal experience with how long the
17 waiting queue might be to access a streaming service to play a
18 game?

19 **A.** I do. It can be over an hour.

20 **Q.** And you were asked about the fact that your personally
21 preferred way of playing Fortnite in some context is on
22 GeForce Now or XCloud. Do you remember that?

23 **A.** I don't think I would say it's my preferred way. It's the
24 way that I play. Like, my preferred way used to be natively on
25 my tablet; but since that's no longer an option, I use

1 streaming on that tablet.

2 **Q.** Okay. Thank you for that connection -- that correction.

3 Is there any -- do you have any special connection to the
4 game on GeForce Now that might cause you to play that?

5 **A.** Yes. I mean, I led the development of both GeForce Now
6 and Fortnite being ported to GeForce Now and Xbox Cloud gaming,
7 so I have a level of affinity and care that I like to, you
8 know, check in on it from time to time.

9 **Q.** And I'd like to refer you to 6619. As a reminder, this
10 was the document that Mr. Mach said that he clicked a couple
11 times to get to on the website.

12 Does this -- do these graphics show literally what a user
13 would experience if they attempted to sideload Fortnite from
14 Epic's website?

15 **A.** No, they don't.

16 **Q.** For example, do these websites show the text of the
17 warnings that are displayed to those users?

18 **A.** No.

19 **Q.** I think in your first testimony you described how this
20 wasn't the entire process. Could you explain what you meant by
21 that?

22 **A.** Yes. There are certain -- even between these four steps,
23 there are certain screens that are just omitted for brevity,
24 and then there would be additional steps after this the user
25 would have to go through before they could play Fortnite.

STOLFUS - VIDEO TESTIMONY

1 **MR. BYARS:** No further questions, Your Honor.

2 **THE COURT:** Okay.

3 **MR. MACH:** Nothing further, Your Honor.

4 **THE COURT:** All right. You may step down. Thank you.

5 (Witness excused.)

6 **THE COURT:** Okay. Who's next?

7 **MS. CHIU:** Your Honor, Google calls or will play the
8 deposition video of Hans Stolfus.

9 **THE COURT:** Okay. Let's get going.

10 **MS. CHIU:** Before we begin, Your Honor, there are some
11 exhibits that we'd like to admit over no objection.

12 Those are Exhibit 812, 813, 814, 815, 10028, 10171, 10184,
13 10193, 10194, 10196, and 10198.

14 **MR. BYARS:** No objection, Your Honor.

15 **THE COURT:** Okay. They're admitted.

16 (Trial Exhibits 812, 813, 814, 815, 10028, 10171,
17 10184, 10193, 10194, 10196, and 10198 received in
18 evidence.)

19 **MS. CHIU:** Ms. Clark, could we have control, please?

20 (Video was played but not reported.)

21 **THE COURT:** Okay. That's it for today. Tomorrow is
22 the last day of evidence. As we've been doing for the last
23 several weeks, put this out of mind. No research. No
24 thinking. No talking. See you tomorrow morning.

25 **THE CLERK:** All rise.

PROCEEDINGS

1 (Proceedings were heard out of the presence of the jury:)

2 **THE COURT:** Okay. What's happening tomorrow for
3 witnesses?

4 **MR. POMERANTZ:** I believe we have three live
5 witnesses, which are the Apple witness, Mrinalini Loew, and --
6 oh, and Greg Leonard, our damages expert.

7 **THE COURT:** Okay.

8 **MR. POMERANTZ:** There will be a few depositions as well.

9 **THE COURT:** Are they going to be as long as this?

10 **MR. POMERANTZ:** No. This was by far the longest.

11 **MR. BORNSTEIN:** We just have Professor Bernheim,
12 Your Honor.

13 **THE COURT:** All right. Good.

14 Okay. I'll see you back in about five minutes. We'll do
15 some of the jury stuff.

16 (Recess taken at 3:37 p.m.)

17 (Proceedings resumed at 3:49 p.m.)

18 (Proceedings were heard out of the presence of the jury:)

19 **THE COURT:** We're going to do a couple more macro
20 issues and post the final instructions tonight, and we'll go
21 over them tomorrow at 3:30. Don't file anything. We're going
22 to do it all on the record. Okay?

23 And when I say "tonight," I'm posting only the 35 ones in
24 question.

25 So let's close out the rule-of-reason discussion.

PROCEEDINGS

1 Mr. Bornstein, you're going to tell me why those three
2 contracts should be per se.

3 **MR. BORNSTEIN:** Yes, Your Honor, although I'm going to
4 make it a little bit easier for the Court. I'm going to tell
5 you why one of them should be per se, and we're going to drop
6 the other two.

7 **THE COURT:** Okay.

8 **MR. BORNSTEIN:** So the ones that we are going to drop
9 are Supercell and Riot.

10 **THE COURT:** Okay.

11 **MR. BORNSTEIN:** But we are going to continue to
12 request the per se instruction with respect to Activision.

13 **THE COURT:** All right. And what facts indicate that
14 that's appropriate?

15 **MR. BORNSTEIN:** So if it would be helpful, Your Honor,
16 I have a binder we can have passed up. I can walk through some
17 of the documents.

18 **THE COURT:** All right. Thank you.

19 Okay.

20 **MR. BORNSTEIN:** So given Your Honor's comments
21 yesterday, I thought it would be better to start with the
22 Activision side of the evidence rather than the Google side of
23 the evidence.

24 **THE COURT:** All right.

25 **MR. BORNSTEIN:** And I would ask Your Honor to take a

PROCEEDINGS

1 look in the first instance at what should be Tab 8 in the
2 binder.

3 **THE COURT:** Tab 8. Okay.

4 **MR. BORNSTEIN:** This is a deck internally that
5 Mr. Zerza testified about on something called Project Boston.
6 If, Your Honor, would look at page 3 of the document.

7 **THE COURT:** Yes.

8 **MR. BORNSTEIN:** You'll see that it describes that
9 Activision is considering two paths side by side. On the left
10 is what's labeled "Enterprise Negotiation." That's the deal
11 with Google that was being discussed.

12 **THE COURT:** Okay.

13 **MR. BORNSTEIN:** And on the right is "Build own mobile
14 store," which is spelled out there in some detail about what it
15 was that they were contemplating.

16 If you go ahead, Your Honor, to page 7 of the document --

17 **THE COURT:** Okay.

18 **MR. BORNSTEIN:** -- there's some more detail here that
19 breaks out exactly what it was they were planning with respect
20 to the store down to things like the number of employees,
21 starting with -- at the very bottom line there, starting with
22 about 15, scaling up to 45 to 70 people working on this.

23 Your Honor may remember from Mr. Zerza's videotaped
24 testimony that they had worked out mockups for the store, what
25 the various screens would look like. This is a description

PROCEEDINGS

1 here of the various resources that are being dedicated and
2 ultimately plan to be dedicated over time starting from
3 something that's a minimal scale, working up to a full solution
4 at full scale by 2021.

5 **THE COURT:** What does "full scale" mean, though?

6 **MR. BORNSTEIN:** Oh. So the full scale, as I
7 understand it, Your Honor, it's an absolute full-scale
8 distribution platform where they are carrying both their own
9 first-party Activision games as well as third-party stores.

10 And you can see, if you look over on the right --

11 **THE COURT:** Well, this is the problem I've been
12 having: It's clear there's some evidence, enough evidence
13 maybe, for the jury to decide that Activision or ABK decided
14 not to do its own store. That's fine.

15 But what I'm missing for per se is that ABK and Google are
16 similarly situated in the stores they were going to provide
17 such that ABK's decision not to launch a store was actually a
18 meaning competitive gesture with respect to the 3 million apps
19 on Google and the 10-, 15-, 20-year first-mover advantage that
20 Google has for its Play Store.

21 In other words, I get it. They didn't want to play on
22 Play, but that doesn't necessarily mean that not launching
23 their own is anticompetitive --

24 **MR. BORNSTEIN:** Understood, Your Honor. I think --

25 **THE COURT:** -- in a per se way.

1 **MR. BORNSTEIN:** Right. Right. Right. I mean, I
2 think --

3 **THE COURT:** Just in a per se way, maybe rule of
4 reason. Just per se.

5 **MR. BORNSTEIN:** I understand that to be the premise of
6 the discussion we're having.

7 I think what the Court is identifying, and if I don't have
8 this right, I'd appreciate it if you set me straight,
9 Your Honor, but I think what you're identifying is the question
10 of whether they were going to be a real meaningful competitor
11 as compared to Google Play.

12 **THE COURT:** Such that a per se instruction would be
13 warranted.

14 **MR. BORNSTEIN:** Right.

15 **THE COURT:** In other words, it has to be an
16 extra-special reason to have per se because it's so egregious,
17 it just can't even be questioned as being anticompetitive. I
18 just don't see that here.

19 **MR. BORNSTEIN:** Okay. I now understand the question,
20 Your Honor.

21 So I think the focus on this should be the history of the
22 way that Google has approached the various competitive threats
23 that it identified over time as the evidence has rolled in.

24 ABK or Activision at the time had one of the biggest games
25 in the world, Call of Duty, which it was contemplating and

PROCEEDINGS

1 talking about internally and with Google launching on its own
2 game-focused store. You may remember there were discussions
3 even about partnering with Epic and with Supercell to make it a
4 consortium of stores sort of all together.

5 That store, whether it was Activision alone as the
6 operator of the store or all of them together, but we'll focus
7 on Activision alone, if it carried its blockbuster titles
8 together with other titles that it would draw to the store, it
9 would not be, you know, a destination maybe for everybody, but
10 it would be a very serious destination for people who were
11 interested in games; and as the evidence has shown, that is a
12 major source of revenue for Google Play.

13 **THE COURT:** I agree with all that, but this is all
14 purely hypothetical. We don't know what the store would look
15 like because it never opened. We don't know how serious of a
16 competitor it would have been. ABK may have been perfectly
17 content to have Call of Duty and five other killer games and
18 call it a day because they just didn't want to deal with a
19 music app or a cooking app or a reading online app because
20 that's not what they do. They're a game company.

21 **MR. BORNSTEIN:** True, Your Honor. I don't think that
22 that should be dispositive as a legal matter.

23 **THE COURT:** Here's the analogy roughly, an entrenched
24 medical device supplier has a monopoly share of, let's say,
25 pulse oximeters and a new company comes in saying "We have a

PROCEEDINGS

1 new pulse oximeter." Okay? So if the entrenched medical
2 device company reaches out to the new entrant and says "I'll
3 tell you what, we'll buy you -- we'll buy you out or we'll sign
4 a contract saying that maybe you'll just sell overseas and
5 leave the U.S. here," and they sign a deal. Okay. I'm not
6 sure that's more than rule of reason.

7 **MR. BORNSTEIN:** That, to me, Your Honor, I would
8 respectfully disagree, that is, I think, an express agreement
9 to carve up markets and not to compete. I mean, I'll put it
10 in --

11 **THE COURT:** The case I litigated where it was rule of
12 reasons.

13 **MR. BORNSTEIN:** I fully expected when Your Honor said
14 pulse oximeter, this was not just a hypothetical.

15 But if you have --

16 **THE COURT:** I'm not saying that was right.

17 **MR. BORNSTEIN:** That seemed like a very specific
18 hypothetical, Your Honor.

19 **THE COURT:** Well, okay. I hear what you're saying.
20 So let me -- I'll tell you what, just in the interest -- I
21 appreciate what -- I will reflect on it. I don't think I'm
22 going to change it, but I will reflect a little bit more.

23 **MR. BORNSTEIN:** I appreciate that.

24 And if, Your Honor, would just permit me --

25 **THE COURT:** Yes, sure.

1 **MR. BORNSTEIN:** -- if I could identify if you will be
2 looking at the documents.

3 **THE COURT:** Yes.

4 **MR. BORNSTEIN:** I would, in particular, direct you
5 it's Tabs 8 and 9 are the ones that reflect the internal
6 Activision materials, and then there are also internal Google
7 materials that shed light on those discussions.

8 **THE COURT:** What's the best one for that?

9 **MR. BORNSTEIN:** I actually think Tabs 1 and 2 --

10 **THE COURT:** 1 and 2?

11 **MR. BORNSTEIN:** -- are helpful.

12 You'll see in Number 1, which is a sort of dense e-mail
13 string, there's a little bit in there, sort of two paragraphs,
14 that identify Google's understanding that Activision was
15 deciding whether to go with the Google deal or with an Amazon
16 deal that would have not included standing down and would have
17 involved having its own store.

18 **THE COURT:** All right. Okay. But we're limited now
19 just to Activision as a potential per se instruction.

20 All right. Now let me ask you -- this is going to largely
21 fall on you in the first instance, Mr. Bornstein -- I have --
22 I'm wondering about the need for a number of these
23 instructions. So let me start --

24 **MR. BORNSTEIN:** Your Honor, if you're going to dive
25 into the instructions, I might pass the microphone to my

PROCEEDINGS

1 colleague.

2 **THE COURT:** Well, I'm not getting into -- these are
3 macro issues about why do we need them. Whoever wants to do it
4 is fine, but we're not -- I'm not line editing.

5 Let me start with the contract claims. Okay? So to my
6 recollection, Epic was open and very public about not paying
7 Google Bit Play's fees. I just don't see -- in fact, one of
8 the witnesses here today said, "Yes, we breached the contract."

9 Why do we need to have all these breach of contract -- I
10 mean, you can own it. We can do damages. All right? We don't
11 have to ask the jury to go through the rather technical
12 exercise of this point of saying, "Well, you heard the Epic
13 fellow say 'We breached the contract.' Do you agree?" We can
14 get rid of all that.

15 I am persuaded that the illegality defense is viable, but
16 it's for me. It's an issue for the Court to decide. All
17 right?

18 So if the jury decides that there has been a Section 1 or
19 Section 2 violation, I will then decide whether it -- was it
20 the DDA? Is that the -- okay -- the DDA is void or
21 unenforceable because it violates the antitrust laws.

22 You will retain that argument; but from what I've seen --
23 you can tell me if you disagree -- the illegality defense is
24 equitable and it's a question for the Court, and I think
25 there's pretty good case law on that. So you wouldn't lose it.

PROCEEDINGS

1 You would be in the position where Google would put their
2 damages case in. You get a number, and that's it on contracts.
3 Okay?

4 That also would take care, I think, of the unclean hands
5 defense, which doesn't make -- and maybe unjust enrichment, but
6 I want to get to that one separately.

7 All right. So here's the proposition: Let's just agree
8 that you can put in a stipulation that -- you can -- let me
9 step back. It's been a long day.

10 We could stipulate that they breached the contract because
11 whatever reason. If you want to say something in there because
12 they disagree with it, you can do that. The only exercise for
13 the jury is to determine how much, if anything, that breach is
14 worth.

15 And then you will do with me all of the postverdict
16 exercises on whether there's an unclean hands defense to the
17 enforcement of the contract or particularly unjust enrichment,
18 whether the contract is illegal and unenforceable and so on.

19 How does that sound?

20 **MR. EVEN:** Your Honor, so I think if you are telling
21 me that you are taking the defense, then I don't think we have
22 any interest in these instructions as Your Honor says. We are
23 not arguing here that the conduct was not in breach if the
24 contract is valid.

25 **THE COURT:** That's what I heard.

PROCEEDINGS

1 Okay. So we're good on that. So we're going to eliminate
2 breach of contract. Google will have its damages instruction.
3 And then everything else, postverdict you come to me and I will
4 decide whether there's an illegality defense or anything else.
5 Okay? All right?

6 **MR. EVEN:** We can do that.

7 **THE COURT:** Mr. Pomerantz, you okay with that?

8 **MR. POMERANTZ:** I'm going to let Mr. Mach answer.

9 **THE COURT:** Okay. Are you okay with that?

10 **MR. MACH:** I think at a high level we are, Your Honor.

11 **THE COURT:** We're not doing high level. This is it.
12 Okay? This is fish or cut bait. So if you're not okay with
13 it, just tell me why. If you are, just say yes because we've
14 got a lot to do.

15 **MR. MACH:** With the contract damages, that seems
16 perfectly fine, Your Honor. I want to discuss with my
17 colleagues what they intend to do with the unjust enrichment
18 issues and if we're just dropping the entire issue or not.

19 **THE COURT:** What they want to do with what?

20 **MR. MACH:** The unjust enrichment issues. We don't
21 have a dispute over the fact that the damages --

22 **THE COURT:** I haven't done unjust enrichment. I'm
23 doing that now.

24 **MR. MACH:** Understood.

25 **THE COURT:** Okay. So we're all in agreement on those.

PROCEEDINGS

1 So those will all be taken out.

2 Now, I do not understand what the unjust enrichment
3 benefit to Epic is that is not exactly the same as what
4 Google's damage are. So why do we need unjust enrichment?

5 **MR. MACH:** Well, we don't have a disagreement,
6 Your Honor, that the damages cannot be recovered twice. That's
7 in the instructions at Number 56.

8 The issue would arise in the event the jury found or
9 Your Honor was to have entertained the jury finding that the
10 contract was not enforceable or legitimate, in which case we
11 would have maintained that.

12 If we don't have a dispute over the breach of contract,
13 then I think the damages are substantially similar.

14 **THE COURT:** All right. So we can drop unjust
15 enrichment?

16 **MR. MACH:** I think we can.

17 **THE COURT:** All right. If we can drop that, we can
18 drop unclean hands because that's the only -- it's an equitable
19 defense to unjust enrichment.

20 Just stay at the podium. Don't pace. Okay?

21 Is the answer -- all right? So we're going to drop unjust
22 enrichment and we're dropping unclean hands?

23 **MR. MACH:** I think unclean hands is their position,
24 Your Honor, but I understand --

25 **MR. EVEN:** I think they go together.

1 **MR. MACH:** I agree with that.

2 **MR. EVEN:** It's a defense to that. So if there is
3 nothing to defend against, we're happy to go.

4 **THE COURT:** Excellent. All that is out. When I say
5 "out," I just mean for the jury. All right? So don't --

6 **MR. EVEN:** Understood, Your Honor.

7 **THE COURT:** Yeah.

8 Okay. Now, let's see, actually that might be it for the
9 macro. I'm going to give you my final set, but I think that's
10 probably all I need for right now.

11 **MR. RAPHAEL:** Your Honor?

12 **THE COURT:** Yes.

13 **MR. RAPHAEL:** Could I be heard on the after-market
14 issue that you discussed yesterday? I think that's a really
15 important instruction about --

16 **THE COURT:** On which one?

17 **MR. RAPHAEL:** The after-market issue.

18 **THE COURT:** Oh. There is no after market. This is
19 not an after-market case.

20 **MR. RAPHAEL:** I think that's why I'd like to be heard
21 on it, Your Honor, if you'll indulge me.

22 **THE COURT:** Very briefly.

23 **MR. RAPHAEL:** Well, Your Honor, I think --

24 **THE COURT:** I'm sorry. I will let you do that. We
25 have other -- what is this breach of implied covenant? Why do

PROCEEDINGS

1 we need that?

2 I don't see how it's different at all from the breach of
3 contract claim. We're going to get rid of that too; right?

4 **MR. MACH:** Yeah, if we have the stipulation.

5 **THE COURT:** Okay. Yeah, that's out too.

6 Okay. After market. I know you want to be within
7 *Epic/Apple*, you're not. This is a different case. So there is
8 no after market or fore market. They have a totally different
9 theory, and there hasn't been a word -- the word "after market"
10 has not been use by a single witness, including the experts in
11 this case. So what is it you want to say?

12 **MR. RAPHAEL:** Well, that's the issue I'd like to
13 address, Your Honor, because I think I'd like to point out to
14 the Court, if I have just a few moments, that I think their
15 theory in this case is actually exactly the same, and I think
16 their own words from both cases actually demonstrate that.

17 **THE COURT:** I think that's actually dead wrong. Okay?

18 And, by the way, the jury instructions are not based on
19 theory. It's based on the evidence in the case. There has
20 been zero mention, let alone evidence, of fore market or after
21 market. So after market will not be given. Okay?

22 So I'm going to take it from here. All right?

23 **MR. POMERANTZ:** Your Honor, I'm sorry.

24 **THE COURT:** Yeah.

25 **MR. POMERANTZ:** That issue is not based on whether

PROCEEDINGS

1 those words were used. The theory of this case by both sides,
2 what we have said over and over again is when you buy a phone,
3 you obviously consider what apps are available on that phone.
4 That is a classic after-market theory.

5 Their response --

6 **THE COURT:** I don't think that's right. There's been
7 a ton of evidence saying that people never even look at the app
8 store when they make their phone choice.

9 **MR. POMERANTZ:** Well, obviously there's a dispute
10 about that because we just showed evidence today that that's
11 not true.

12 **THE COURT:** In the *Apple* case, which I have looked at
13 quite extensively, the experts pitched it as fore market/after
14 market, some variation of *Kodak*.

15 Now, whether they decided to pursue that because they
16 didn't like the outcome in *Epic* or whatever, it doesn't matter.
17 It's not in this case.

18 **MR. POMERANTZ:** But, Your Honor, you're talking --

19 **THE COURT:** Am I -- are you doing that? Is that your
20 theory?

21 **MR. EVEN:** We haven't alleged it. We're not pursuing
22 it. It's not what our experts said, Your Honor.

23 **MR. POMERANTZ:** Your Honor, the record is clear. What
24 they came in here and argued was that once you buy a phone --
25 if you buy an iPhone, you can only go to the app store. If

PROCEEDINGS

1 you buy an Android phone, you can't go to the Apple App Store.
2 That is at its core an after-market theory.

3 **THE COURT:** I do not agree with that in the least.
4 Not in the least.

5 **MR. POMERANTZ:** The underlying economics are the --

6 **THE COURT:** That was front and center in the other
7 case. It has been a complete absentee presence and not even a
8 ghost. It's not even on the record here.

9 So I -- it's okay. I'm not doing the after market. That
10 is just completely inconsistent with the evidence that has been
11 presented in this case.

12 All right. I'll get this done, and we'll talk tomorrow at
13 3:30 for the final ones.

14 Now anything else before the morning?

15 **MR. MACH:** Could I take up a very small issue?

16 **THE COURT:** Sure. Yeah.

17 **MR. EVEN:** For this should I stay?

18 **MR. MACH:** I don't know if it's your issue or not,
19 Yonatan.

20 **MR. EVEN:** I don't either.

21 **MR. MACH:** The parties have been working very hard to
22 eliminate disputes on depo designations. We have one very
23 simple foundation issue.

24 **THE COURT:** All right. What is it?

25 **MR. MACH:** Both Mr. Sussman and Mr. Gelber provide

PROCEEDINGS

1 substantially the same testimony about the 30 percent rate that
2 consoles charge, and they both say they think that the console
3 charges are totally different than what we have here because
4 the console makers sell the console devices at a loss and they
5 subsidize the rest of the platform.

6 We don't see any foundation for them to claim an
7 understanding of the internal finances of the console makers.
8 And, in fact, Mr. Gelber says in the testimony that has been
9 designated his knowledge is based on articles that he's written
10 elsewhere.

11 **THE COURT:** Who are these people? Who are Sussman and
12 Gelber?

13 **MR. MACH:** That's a fair question, Your Honor. They
14 are both Epic employees.

15 **THE COURT:** They haven't testified yet.

16 **MR. MACH:** These are for designations that would be
17 played tomorrow.

18 **THE COURT:** All right.

19 **MR. BORNSTEIN:** Your Honor, if I can be helpful, I can
20 address it.

21 So Mr. Sussman is the president of Epic. He's an
22 individual who has been in the video game industry with a brief
23 detour to Nike for many, many years. And as he explained in
24 his deposition and just from his experience in the industry, he
25 has an understanding of the economics behind the way Microsoft

PROCEEDINGS

1 and Sony run their console businesses, and he testifies to that
2 in response to questions from Google. This is testimony that
3 they elicited from Mr. Sussman. And Mr. Gelber, similarly, is
4 the chief financial officer of Epic.

5 And so Google --

6 **THE COURT:** And what are they going to say? That they
7 pay 30 percent to console makers?

8 **MR. BORNSTEIN:** Right. They testified to that, and
9 then they are asked by Google whether they believe that those
10 situations are comparable to the 30 percent that's paid to
11 Google. And they explain their understanding of why the
12 economics of what's paid to the console makers is different
13 from the relationship with Google, and that's based on their
14 experience in the industry and their interactions with the
15 console makers and over many, many years.

16 **THE COURT:** What's wrong with that? He's the
17 president and CFO. I mean, they know the business.

18 **MR. MACH:** Well, they presumably know Epic's business,
19 but what we're talking about right now is the economics of a
20 business run by Microsoft or Sony.

21 Microsoft, for example, sells the Xbox console for some
22 hundreds of dollars, and what Mr. Sussman and Mr. Gelber are
23 testifying to is whether they are talking a loss or making a
24 profit when they sell that console.

25 **THE COURT:** Whether Microsoft is taking a loss?

PROCEEDINGS

1 **MR. MACH:** Correct, Your Honor. Whether a third-party
2 company, that as far as I know, they've had no association with
3 personally for selling that at a loss or a profit.

4 **THE COURT:** How would they know that?

5 **MR. BORNSTEIN:** Well, from extensive conversations
6 with and experience with both of these companies, as well as
7 published --

8 **THE COURT:** Is it along the lines of "It's my belief
9 that"? Is that sort of the testimony?

10 **MR. BORNSTEIN:** Mr. Sussman's testimony is not
11 caveated in any way along those lines. We can -- if Your Honor
12 would like to take a look at it, we can obviously share it.

13 Mr. Gelber --

14 **THE COURT:** Let me take a look at it.

15 **MR. BORNSTEIN:** I mean, this is testimony, Your Honor,
16 that they elicited and could have followed up with more
17 foundation questions if it was something they were concerned
18 about at the time.

19 **MR. MACH:** Your Honor, I don't understand the
20 relevance of whether we asked about this at a deposition or
21 not. We asked about it. We had every right to ask about it.
22 It doesn't mean that the witness had foundation.

23 **THE COURT:** All right. So what am I looking at here?
24 The yellow section?

25 **MR. BORNSTEIN:** It should be highlighted, Your Honor,

1 yes.

2 **THE COURT:** All right. This is Adam Sussman (as
3 read):

4 **"QUESTION:** What commission does Sony charge?

5 **"ANSWER:** 30 percent.

6 **"QUESTION:** How about Microsoft?

7 **"ANSWER:** 30 percent.

8 **"QUESTION:** Do you think those are too high?"

9 That's okay. You can ask that. That's all fine. (as
10 read):

11 **"QUESTION:** What do you mean by that?

12 **"ANSWER:** Those platforms invest a significant amount of
13 money."

14 Okay. This is fine. You can do that.

15 Okay. So that objection is overruled.

16 Now let's look at the one for Randy Gelber.

17 (Pause in proceedings.)

18 **THE COURT:** All right. (as read):

19 **"QUESTION:** What are those?"

20 What are we talking about? What's the "those"?

21 **MR. BORNSTEIN:** I'm actually not sure offhand,
22 Your Honor. I think I have it in my...

23 **THE COURT:** Microsoft or Nintendo, is that the
24 "those"?

25 **MR. BORNSTEIN:** Yeah, there are a few questions before

PROCEEDINGS

1 that, Your Honor, which we did agree to resolve a 106 objection
2 from Google to add, which are just questions about what the
3 commissions are that are charged on the other platforms.
4 That's starting at line 8.

5 **THE COURT:** The antecedent of those is (as read):

6 **"QUESTION:** Are there business reasons you're aware of why
7 Epic hasn't sued Sony or Nintendo?"

8 And he says, "Yes." And then he's asked (as read):

9 **"QUESTION:** What are those reasons?

10 **"ANSWER:** Those are -- you know, we believe those to be
11 competitive markets. We believe" --

12 Okay. It's his belief. I mean, he's entitled to say
13 that. He's in the industry.

14 Okay. (as read):

15 **"QUESTION:** How about the cost structure? Is that
16 different?

17 **"ANSWER:** Well, they subsidize hardware. Mobile apps are
18 typically" --

19 That seems fine. He's a fellow in the industry who's
20 saying "Here's what I understand the world to be like."
21 There's nothing wrong with that.

22 **MR. MACH:** For Mr. Gelber, Your Honor, if you look at
23 the testimony, he says in his answer that he's just reading it
24 from public press accounts. I think that, at best, there's a
25 hearsay foundation for that.

PROCEEDINGS

1 **THE COURT:** I'm only looking at what's highlighted for
2 me, which is that yellow section.

3 **MR. MACH:** I don't have a copy of what they provided
4 to the Court, Your Honor.

5 **THE COURT:** I thought this was your objection.

6 **MR. MACH:** It is, Your Honor.

7 **THE COURT:** Oh.

8 **MR. MACH:** I just don't know what section of the
9 transcript they've handed to you.

10 **THE COURT:** Can you hand him it?

11 **MR. BORNSTEIN:** I've been asking. I think we may not
12 have another copy, Your Honor.

13 **THE COURT:** Well, here.

14 **MR. BORNSTEIN:** It was just the section that was
15 disputed that the parties had opposed.

16 **MR. MACH:** Thank you, Your Honor.

17 **THE COURT:** Just make sure that's the part you're
18 objecting to. I thought you were all on the same page here.

19 **MR. MACH:** I suspect that it is.

20 (Pause in proceedings.)

21 **MR. MACH:** Yeah, this is what I was referring to.

22 Your Honor, if you read the testimony here, he's asked (as
23 read):

24 **"QUESTION:** How is the cost structure different?

25 **"ANSWER:** Well, they subsidize hardware, so they sell

PROCEEDINGS

1 their hardware, as far as I can tell from widely published
2 reports, at a loss."

3 So he's just repeating something from a hearsay source.

4 **THE COURT:** He's asked "Why do you believe this?"
5 That's perfectly fine. There's nothing wrong with that.

6 He's not being asked: As an independent expert in the
7 industry, what's your conclusion with respect -- why do you
8 believe this? You can ask that.

9 Listen, you-all have asked people a lot of questions --
10 okay? -- about what do you believe and what do you think, and
11 you keep coming up with research, which nobody's objecting to,
12 which I would say "Don't do that," but if you're fine with it,
13 you're fine with it. You introduced about seven questions and
14 say "I just pulled this up last night." Well, you're not a
15 witness. Okay?

16 You know, it's fine, your colleagues here aren't
17 objecting. There's been a lot -- the point is, there's been an
18 enormous amount of leeway for everybody. These are perfectly
19 fine.

20 Now, let's just look down the road a little bit for
21 closing. All right? You get an hour each. I think that
22 should be more than enough.

23 Make sure you exchange your demonstratives beforehand. I
24 really would like a seamless opportunity for both of you to
25 talk without interruption to the jury. I think that's an

PROCEEDINGS

1 important way to close. All right? So work it out ahead of
2 time. If you can't, we'll deal with it.

3 I've advised the jury they're going to be here 9:00 to
4 5:00 all those days, you know, until they're ready to go.

5 I'm not going to have the proposed verdict form ready
6 until early next week. So we'll do that.

7 Oh, you know what you could do? Actually two things, if
8 you would. Given what we discussed today, give me a new one
9 that takes out the contract and all that stuff. And also I
10 need both of you to send to me the words you want to use for
11 the breach of contract stipulation. Okay? It should be just
12 one sentence I would imagine.

13 **MR. POMERANTZ:** We'll talk tonight about it.

14 **THE COURT:** It probably shouldn't be anything more
15 than "Epic does not dispute that it breached of DDA." Okay?
16 Something along those lines. All right?

17 Okay. And we'll go over the rest tomorrow, including the
18 adverse inference instruction.

19 All right. See you in the morning.

20 **THE CLERK:** All rise. Court's in recess.

21 (Proceedings adjourned at 4:16 p.m.)

22 ---oOo---

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, November 30, 2023

A handwritten signature in black ink, reading "Kelly Shainline", is written over a horizontal line.

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter